(32,240)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 673

ED. W. HOPKINS, ASSESSOR OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA; E. M. ROSS, DEPUTY ASSESSOR, ETC.; W. O. WELCH, TAX COLLECTOR, ETC., ET AL., PETITIONERS,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fols. 1 & 2]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA

No. J 16 N. In Equity

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a Corporation, and The Pacific Telephone and Telegraph Company, a Corporation, Plaintiffs,

vs.

Ed W. Hopkins, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a Body Corporate and Politic, Defendants

Citation, in usual form, showing service on Edward T. Bishop et al., filed March 11, 1926, omitted in printing.

[fol. 3] IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed July 17, 1925

The above named plaintiffs, as their bill of complaint against the above named defendants, allege as follows:

[fol. 4] I

That at all times herein mentioned each plaintiff was and is now a corporation organized and existing under the laws of the State of California.

II

That at all of said times the defendants Ed W. Hopkins, F. M. Ross, W. O. Welch and H. A. Payne were and are now, respectively, duly qualified and acting assessor, dep-

uty assessor, tax collector and auditor of the defendant County of Los Angeles, State of California.

III

That at all of said times the defendant County of Los Angeles was and now is a county of the State of California and as such a body corporate and politic duly organized and existing under the laws of said state.

IV

That this is a suit of a civil nature in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.), and arises under the Constitution of the United States.

V

That the plaintiff The Pacific Telephone and Telegraph Company is now, and for many years last past has been, authorized and empowered by its Articles of Incorporation, to do a general telephone and telegraph business, and that as such corporation it has constructed and established, and now maintains and operates, and has maintained and [fol. 5] operated for many years last past, extensive telephone and telegraph lines and systems and apparatus and appliances, for the purpose of transmitting messages and intelligence by electricity, in the states of California (including the County of Los Angeles), Oregon, Washington and Idaho; that said plaintiff now, and for many years last past in the transaction of its said business, and as a part thereof, transmits and delivers, and has transmitted and delivered, by means of its said lines and systems and telegraphic and telephonic instruments and apparatus connected therewith, messages and communications originating at points and places in the United States outside of the State of California, and transmitted by and over its said lines to points and places within said County of Los Angeles, and to other points within said State of California, and also in like manner and by like means transmits, and has transmitted for many years last past, like messages and

communications originating at points and places within said County of Los Angeles, and elsewhere within the said State of California, to points and places in other states of the United States, and also in like manner and by like means transmits and delivers, and at all said times has transmitted and delivered, messages and communications originating within the said County of Los Angeles and at other points within the State of California and other places within said state; that at all of said times the plaintiff Southern California Telephone Company was and is now authorized and empowered by its Articles of Incorporation to do a like business, and said plaintiff has at all of said (fol. 6) times maintained and operated, and now maintains and operates, like telephone and telegraph lines and systems in said County of Los Angeles, and has likewise transmitted and delivered at all of said times, and now transmits and delivers, like messages and communications to and from said County of Los Angeles, and other parts of the United States, both within and without the State of California; that said lines and systems of the two plaintiffs connect, and plaintiffs by means thereof supply telegraph service and the greater part of the public telephone service rendered in said County of Los Angeles, the plaintiff Southern California Telephone Company operating for the most part in the City of Los Angeles therein, and the plaintiff The Pacific Telephone and Telegraph Company operating elsewhere in said county; that at all times herein mentioned both plaintiffs were and are now public service corporations, and both plaintiffs are threatened with similar great irreparable and immediate loss, damage and injury by the threatened acts of the defendants hereinafter set forth.

VI

That as part of their said respective lines and systems and businesses plaintiffs now maintain and operate in said County of Los Angeles upwards of three hundred thousand telephone instruments; that each of said instruments consists of a receiver, transmitter and induction coil (collectively termed by said defendants a "telephone talking set," as hereinafter appears) and a stand or body and the

[fol. 7] wiring and other apparatus associated therewith; that the so-called "talking set" is an integral part of each said instrument, which cannot be used for the transmission of messages or intelligence without it; that said "talking sets" are indispensably necessary to the operation of the said respective lines, systems and businesses of the respective plaintiffs.

VII

That at all times herein mentioned, all the "talking sets" used by plaintiffs in said County of Los Angeles in connection with their respective lines, systems and businesses were and are now owned by American Telephone and Telegraph Company, a New York corporation, and were at all of said times, and are now, leased by said American Telephone and Telegraph Company to said respective plaintiffs; that the stands or bodies and other parts of said instruments were at all of said times, and are now, owned by plaintiffs.

VIII

That heretofore and on or about the 29th day of April, 1925, the defendant Ed W. Hopkins, purporting to act as such assessor of said County of Los Angeles, addressed to said American Telephone and Telegraph Company a certain notice as follows:

[fol. 8] "207607. Form 10-A. E. W. H. May 4, 1925.

Please return notice.

Office of County Assessor, Ed. W. Hopkins, Assessor, Hall of Records, Los Angeles, Cal.

4-29, 1925.

American Telephone and Telegraph Co., New York City, N. Y.:

You are hereby notified that taxable Personal Property belonging to you located at L. A. Tax Dis #1 308280 Telephone Talking Sets @ 5.00 County of Los Angeles, State of California, has been assessed for the fiscal year 1925, at the valuation of $1,541,000.

Amount of Tax, $57,017.00.

The same is now due and payable to the Assessor in accordance with the law.

Yours respectfully, Ed W. Hopkins, County Assessor, by B., Deputy.

Sec. 3820. The Assessor must collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property, sufficient to secure the payment of the taxes.

Sec. 3756. The taxes on all personal property unsecured by real property shall be due and payable immediately after the assessment of said personal property is made.

[fol. 9] Sec. 3821. * * * the Assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed.

Escaped assessment in 1924. Assessed double in 1925 as per Sec. 3649 P. C."

That thereafter, and on or about June 12, 1925, said defendant, purporting to act as such assessor, addressed to said company a second notice, as follows:

"207,697. Please return notice. Delinquent After 6-12, 1925.

Office of County Assessor, Ed. W. Hopkins, Assessor, Hall of Records, Los Angeles, Cal.

6-12, 1925.

American Telephone and Telegraph Co., New York City, New York:

On 5-29-25 you were notified that there was a tax due from you as follows: Tax $57,017.00.

At the same time you were given all possible information regarding the matter, but no reply has been received by this office.

This tax is due and payable now, and you are requested to forward same at once.

Yours respectfully, Ed W. Hopkins, County Assessor, by B., deputy."

Form 11. E. W. H. MD.

[fol. 10] IX

That the pretended tax thus stated to have been assessed against the "telephone talking sets" mentioned in said notice dated April 29, 1925, has not been paid, and that the defendants herein, pretending to act in pursuance of sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793, of the Political Code of the State of California, have threatened and still threaten to seize and sell forthwith so many of said "telephone talking sets" as may be necessary to satisfy said pretended tax; that on or about the 8th day of July, 1925, the defendants, by the defendants Ed. W. Hopkins and F. Ross, sent to Oscar Lawler and to Alfred Sutro, attorneys, respectively, for the plaintiff Southern California Telephone Company and The Pacific Telephone and Telegraph Company, the following communication:

"County of Los Angeles

Ed. W. Hopkins, Assessor. E. O. Weed, Chief Deputy

Los Angeles, California, July 8, 1925.

American Telephone & Telegraph Co. c/o Oscar Lawler, 800 Standard Oil Building, Los Angeles, California.

GENTLEMEN: I, Ed W. Hopkins, Assessor of the County of Los Angeles, State of California, have levied an assessment in the sum of $1,427,331.00 upon the receivers, transmitters and induction coils belonging to you and situate in [fol. 11] the County of Los Angeles. A tax of $52,224.45 was due immediately upon the assessment of said property. This tax has not been paid and is now delinquent. If it is not paid immediately I will proceed in pursuance of sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code to collect same by seizing and selling so much of said property as is necessary to satisfy the tax.

We are again transmitting herewith the notices previously left with you which set forth the quantities, location, valuation and amount of the tax levied.

Yours very truly, Ed W. Hopkins, County Assessor, by F. M. Ross, Deputy.

Copy to Alfred Sutro, Union Oil Bldg., San Francisco, California."

X

That on the first Monday in March, 1925, all the "talking sets" mentioned in said notice dated April 29, 1925 (these being the same property as the receivers, transmitters and induction coils mentioned in said notice dated July 8, 1925), were, ever since have been, and now are, operative property of the respective plaintiffs herein, that is to say, property used exclusively in the conduct of their said respective businesses in said State of California; that on or about the 12th day of March, 1925, in accordance with law, plaintiff Southern California Telephone Company [fol. 12] and plaintiff The Pacific Telephone and Telegraph Company, respectively, duly filed with the State Board of Equalization reports in the form and within the time prescribed by law, showing in detail for the year ending December 31, 1924, among other things, all their respective property in said state coming under the definition of "Operative Property" in Section 3665-B of the Political Code of the State of California, and plaintiffs included in said reports as such operative property all of the telephone instruments which were on said 31st day of December, 1924, located in said County of Los Angeles, which instruments included, as integral parts thereof, all the "talking sets" mentioned in said notices which were located in said County of Los Angeles on said day; that said plaintiffs thereafter and on or about the 15th day of June, 1925, each filed an amended report with said Board, including therein as such operative property of the respective plaintiffs all telephone instruments then located in the County of Los Angeles, and including, as aforesaid, all "talking sets" mentioned in said notices and located in said county on said day; that each plaintiff, in accordance with law, duly furnished a duplicate of its said respective report and of its said amended report, covering so much of its said property as was located in the County of Los Angeles, to defendant Ed W. Hopkins, as such assessor; and that said defendant, as such assessor, did not, nor did any of the other defendants, notify the State Board of Equalization that said [fol. 13] "talking sets," or any thereof, so included by plaintiffs in their said respective reports, were not operative property of the respective plaintiffs.

XI

That pursuant to Section 14 of Article XIII of the Constitution of the State of California, the taxes upon all the "talking sets" in said notices mentioned were, on the first Monday in March, 1925, ever since have been, and now are, entirely and exclusively for state purposes, and required to be levied, assessed and collected in the manner in said section provided; that pursuant to said section and the laws of the State of California passed to carry the same into effect, taxes have been levied upon the gross receipts of the respective plaintiffs from their respective operations during the year ending December 31, 1924, within said state, and plaintiffs are now, and at all times have been, ready, willing and able to pay the same within the time allowed by law, and said taxes, pursuant to said section, are in lieu of all other taxes and licenses, state and municipal, upon the operative property of plaintiffs, including said "talking sets," and all of them; that said "talking sets" did not, nor did any of them, "escape assessment" in 1924 (as alleged in said notice dated April 29, 1925), but, on the contrary, all of the same which were, on the first Monday in March, 1924, located in said County of Los Angeles were then operative property of one or the other of plaintiffs as aforesaid, and that the taxes thereon, under said Section 14 of Article XIII, then were on said first Monday in March, [fol.14] 1924, ever since have been and now are, entirely and exclusively for state purposes; that each of the plaintiffs paid state taxes, as required by law, upon its gross receipts from its operations within said state for the year ending December 31, 1923, which said taxes, under said section, were in lieu of all other taxes and licenses, state and municipal, upon the operative property of plaintiffs, including all of said "talking sets," located in Los Angeles County on the first Monday in March, 1924; that the pretended tax or assessment mentioned in said notices is unlawful and wholly void.

XII

That the laws of the State of California contain no provision whereby plaintiffs, or either of them, could pay the pretended tax upon said "talking sets," or any part thereof, under protest, and thereafter bring suit to recover the same,

nor could plaintiffs, or either of them, under said laws, even if such recovery were possible, recover any interest thereon.

XIII

That the threatened seizure and sale by defendants of said "talking sets," or enough thereof to satisfy said pretended tax, would disrupt and paralyze the respective telephone services of both plaintiffs within said County of Los Angeles, and would cut off all telephone communication over the lines or systems of both plaintiffs between said said county and all other parts of the United States, preventing, among other things the transmission of interstate messages, and otherwise causing great inconvenience to the [fol. 15] patrons of plaintiffs and to the public; that such threatened seizure and sale would deprive plaintiffs of the use of all their lines and systems within said county, and of their revenues therefrom, and subject plaintiffs to *to* the risk of numerous damage suits by patrons whose service had thus been interfered with or cut off; that the consequent loss, damage and injury to each plaintiff, from such seizure and sale, would be immediate and irreparable and would greatly exceed the sum of three thousand dollars ($3,000.).

XIV

That, for the reasons aforesaid, such threatened seizure and sale would deprive each plaintiff of its right and privilege to transmit messages between said county and other places in the United States, and would deprive each plaintiff of its property without due process of law, and deny to each plaintiff the equal protection of the laws, and is and would be in violation of the rights, privileges and immunities of each plaintiff under the Constitution of the United States, and particularly under subsection 3 of section 8 of Article I thereof, and of the Fourteenth Amendment thereto.

XV

That sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code of the State of California, in so far as the same, or any of them, purport to authorize said threat-

ened seizure and sale, are contray to and in violation of the Constitution of the United States, particularly subsection 3 [fol. 16] of section 8 of Article I thereof, and of the Fourteenth Amendment thereto, and said sections are, and each of them is, to that extent, unconstitutional and void.

XVI

That, for the reasons herein alleged, said pretended tax upon said "talking sets" is wholly void and is not owing in whole or in part to the defendants, or any of them; but plaintiffs nevertheless hereby offer, in the event that said tax, or any part thereof, should be held valid, to pay the same at once, and they aver that they are financially able to pay said tax.

XVII

That immediate and irreparable injury, loss and damage will result before notice can be served and a hearing had upon plaintiffs' application for a temporary restraining order as hereinafter prayed, for the reasons hereinbefore stated, and for the further reason, as plaintiffs are informed and believe and so allege, that if notice were given to defendants of said application for a temporary restraining order, defendants, or some of them, would thereupon immediately proceed to seize and sell said "talking sets" to satisfy said pretended tax thereon, as a result of which plaintiffs would suffer great and irreparable injury, loss and damage, as above alleged.

XVIII

That plaintiffs have no plain, speedy or adequate remedy at law, and can have relief only in a court of equity where matters of this kind are properly cognizable; that this is a [fol. 17] case in equity within the jurisdiction of this Honorable Court.

Wherefore, inasmuch as plaintiffs can have no adequate relief, except in this court, and to the end therefor- that the defendants may, if they can, show why plaintiffs should not have the relief herein prayed, and a full, true, direct and perfect answer make to the matters herein stated and

charged, but not under oath (answer under oath being hereby expressly waived), plaintiffs pray:

1. That this Honorable Court grant unto them a writ of subpœna ad respondendum, issuing out of and over the seal of this Honorable Court and directed to said defendants, commanding them and each of them on a certain day and under a certain penalty therein to be inserted, to appear in this Honorable Court and then and there make full, direct, true and perfect answers to all and singular the premises, but not under oath (answer under oath being hereby expressly waived), and further to stand, do, perform and abide by such order and decree as to this Honorable Court may seem meet.

2. That it be adjudged and decreed that the aforesaid pretended tax of fifty-seven thousand and seventeen dollars ($57,017.) is unlawful and wholly void.

3. That it be adjudged and decreed that said threatened sale and seizure of said "talking sets" would be in violation of the Constitution of the United States and of the rights, privileges and immunities of plaintiffs thereunder.

[fol. 18] 4. That it be adjudged and decreed that plaintiffs be granted a writ of injunction issuing out of and over the seal of this Honorable Court against defendants, and each and all of them, and against all persons acting by or under the authority of defendants or any of them, as officers, agents, deputies, servants, employees, or otherwise, perpetually enjoining and restraining them, and each of them, from seizing or selling, or attempting to seize or sell, said "talking sets," or any of them, to collect or satisfy said pretended tax, or otherwise for such purpose molesting or interfering with the same, or with the telephone instruments, or any thereof, of which, as aforesaid, said "talking sets" are integral parts.

5. That upon the filing of this bill of complaint this court make its order directed to said defendants commanding them, and each of them, to be and appear before this Honorable Court at a time and place therein to be designated, then and there to show cause, if any they have, why this Honorable Court should not enjoin them, and each of them, their officers, agents, deputies, servants and employees from

the acts aforesaid, pending the final determination of this cause, and that in and by said order to show cause this court make its temporary restraining order restraining said defendants, and each of them, their officers, agents, deputies, servants and employees from said acts until the hearing and determination of said order to show cause; and that upon the hearing of such order to show cause this Honorable Court grant the plaintiffs their preliminary injunction re- [fol. 19] straining said defendants, their officers, agents, deputies, servants and employees as herein prayed, pending the final hearing and determination of this cause.

6. That if at any time hereafter, and prior to the final hearing hereof, any person shall attempt to seize or sell said "talking sets," or any thereof, to collect or satisfy said pretended tax, or otherwise under color of said pretended tax, or pretense of collecting or satisfying the same, molest or interfere with the said "talking sets," or with the instruments of which, as aforesaid, said "talking sets" are integral parts, such person or persons, or some of them in behalf of all, be made parties defendant herein, and each of them be enjoined and restrained as hereinabove prayed, and that plaintiffs be granted their costs of suit and such further and other relief in the premises as to the court shall seem meet, and the nature of the case require.

Lawler & Degnan, Attorneys for Plaintiff.

Duly sworn to by H. D. Pillsbury. Jurat omitted in printing.

[fol. 20] [File endorsement omitted.]

In United States District Court

Amendment to Bill of Complaint—Filed October 26, 1925

Now come the plaintiffs above named and by leave of the court first had and obtained file this their amendment to their bill of complaint herein, and as paragraph XII A allege as follows:

The said tax of $52,224.45, in satisfaction of which, in paragraph IX of the complaint it is alleged, the defendant,

Ed W. Hopkins, as Assessor of the County of Los Angeles, [fol. 21] threatens to seize and sell the talking sets, is a tax threatened to be collected in part for the County of Los Angeles, and in part also for each of the hereinafter mentioned municipalities in the said County of Los Angeles. That each of said municipalities is a municipal corporation duly incorporated and existing under the laws of the State of California. That each of said municipalities, by ordinance heretofore duly adopted and numbered and dated respectively as hereinafter set out, has adopted the provisions of that certain act of the State of California, approved March 27, 1895, as amended, and entitled "An act to provide for the levy and collection of taxes by and for the use of municipal corporations and cities incorporated under the laws of the State of California," etc.

That the respective numbers of the ordinances and the dates of their adoption by each of said municipalities are as follows:

Municipality	Ordinance No.	Date
Glendale	343	January 2, 1919.
Burbank	71	February 20, 1914.
Watts	116	September 5, 1911.
Montebello	17	February 5, 1921.
Inglewood	168	January 29, 1914.
Huntington Park	484	December 18, 1922.
Hawthorne	20	January 22, 1923.
San Gabriel	51	December 30, 1913.
South Pasadena	373	December 9, 1912.
Vernon	39	January 27, 1910.
San Marino	7	January 22, 1914.
[fol. 22] Monterey Park	36	January 26, 1918.
El Segundo	3	January 31, 1917.
Culver City	12	January 28, 1918.
Beverly Hills	3	January 31, 1914.

Los Angeles, Ordinance No. 40302, N. S., adopted May 10, 1920, as amended by Ordinance No. 45027, N. S., adopted November 14, 1922, as amended by Ordinance No. 46057, N. S., adopted April 20, 1923.

That under the provisions of the said act of March 27, 1895, as amended, the net amount of taxes collected for a

municipal corporation, as ascertained by the provisions of said act, must be paid to the treasurer of the municipal corporation to which it respectively belongs, such payment to be made under the general requirements and penalties provided by law in the State of California for the settlement of other taxes. That under the laws of the State of California settlement must be made by a tax collector with the county treasurer on the first Monday of each month and at least once a month. That if the said tax were paid by plaintiffs, the parts thereof respectively belonging to the said respective municipalities would be paid to the same as provided by law, and if plaintiffs had any remedy by suit or action at law to recover the tax so paid, plaintiffs would be obliged to bring such a suit or action at law separately against each of said municipalities, as well as against defendants, and plaintiffs would thereby be subjected to a great multiplicity of suits. That the re- [fol. 23] spective parts of said tax so to be paid to each of said respective municipalities are considerable, but plaintiffs are unable to ascertain the exact parts of said tax which if collected from plaintiffs would be paid to each of said municipalities.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Pillsbury, Madison & Sutro, of Counsel.

Duly sworn to by H. D. Pillsbury. Jurat omitted in printing.

[fol. 24] [File endorsement omitted.]

In United States District Court

Answer—Filed August 6, 1923

Now come the defendants above named and all of them, and reserving all manner of exceptions that may be had to the uncertainties and imperfections of the Bill, and answering thereto, admit, deny and allege as follows:

I

Admit all the allegations contained in paragraph I, II, and III.

II

Answering paragraph IV of plaintiffs' complaint, deny that plaintiffs' suit arises under the Constitution of the United States or under any law or treaty thereof.

III

Answering paragraph V of plaintiffs' complaint, defendants deny that plaintiffs, or either of them, are threatened with great, irreparable, immediate or any loss, damage and or injury by the threatened or any acts of the defendants or any of them.

IV

Admit the allegations contained in paragraphs VI and VII of plaintiffs' complaint and in this connection allege [fol. 25] that the "telephone talking sets" mentioned therein are owned, maintained and kept in repair by the American Telephone and Telegraph Company, a New York Corporation; that said American Telephone and Telegraph Company is not a public utility operating within the State of California, and has paid no tax on said "telephone talking sets" either to the State of California or to the County of Los Angeles, or to any of the municipal corporations in which such property is located; that such property of said company is not exempted from local taxation by the Constitution or the laws of the State of California, and that the said tax so imposed on said property is legally and equitably due the County of Los Angeles.

V

Admit the allegations contained in paragraph VIII, of plaintiffs' complaint.

VI

Answering paragraph IX of plaintiffs' complaint defendants admit the sending of the notice therein incorporated, and admit that the tax assessed upon the American Telephone and Telegraph Company according to the provisions of the law of the State of California, has not yet been paid and here allege the true amount of said tax to be Fifty-two

Thousand Two Hundred Twenty-four and 45/100 Dollars ($52,224.45).

VII

Answering paragraph X of plaintiffs' complaint defendants deny that on the first Monday in March, 1925, or at [fol. 26] any time, the "talking sets" herein referred to, were, or now are, operative or any property of the plaintiffs' or either of them, and deny that the report filed by the plaintiffs with the State Board of Equalization for the year ending December 31, 1924, of their respective property included under the definition of "operating property" or otherwise, the "telephone talking sets" referred to herein.

VIII

Answering paragraph XI of plaintiffs' complaint, defendants deny that pursuant to Section 14 of Article XIII of the Constitution of the State of California, or at all, the taxes upon all or any of the "talking sets" were on the first Monday in March, 1925, or ever, entirely and/or exclusively or at all, for State purposes, and/or were required to be levied, assessed and collected under the provisions of law relating to the levy, assessment and collection of taxes for State purposes.

Deny that the taxes paid by plaintiffs or either of them for State purposes covered the "talking sets", or any of them.

Deny that any taxes have been paid upon said "talking sets" for the year 1925 as required by law or at all, and deny that any taxes paid by these plaintiffs or either of them to the State of California, covered the said "talking sets" or had the effect of exempting them from liability for the taxes levied thereon by the County of Los Angeles. Deny that the tax or assessment levied against said "talking sets" is unlawful and/or void.

[fol. 27] IX

Answering paragraph XII deny that the laws of the State of California contain no provision whereby plaintiffs or either of them could pay the tax upon the "talking sets" under protest and thereafter bring suit to recover the same,

but on the contrary, allege that the laws of the State of California, permit such payment and suit to recover the taxes so paid.

X

Answering paragraph XIII of plaintiffs' complaint, defendants admit that the seizure and sale of "talking sets" would cause inconvenience to the plaintiffs, but deny that such inconvenience is in legal effect in any manner different from the inconvenience caused by any other seizure and sale of property under the laws of the State of California, for failure to pay taxes thereupon duly levied and assessed; or that such inconvenience would in any way entitle plaintiffs or either of them to any remedy or relief at law, or in equity, and in this connection allege that such seizure and sale and such inconvenience can readily be obviated by plaintiffs by the payment of the taxes levied and assessed upon such "talking sets"; defendants further deny that the seizure and sale of sufficient "telephone talking sets" to cover the unpaid taxes due from defendants to the County of Los Angeles, would hinder or prevent the transmission of interstate telephone messages or would in any way interfere with interstate or foreign commerce.

[fol. 28] XI

Answering paragraph XIV of plaintiff's complaint, defendants deny that a seizure and sale of said "talking sets" would deprive plaintiffs or either of them of any property without due process of law, or deny plaintiffs or either of them, equal protection of the law, and or would be in violation of any of the rights, privileges and or immunities under said subsection 3 of Section 8 of Article I. of the Constitution of the United States, or the Fourteenth Amendment thereto, or any provision of, or amendment to the said Constitution of the United States, or would be in violation of any right, privilege and or immunity of plaintiffs or either of them under the laws or treaties of the United States or under the Constitution of the State of California, or any of the laws thereof.

XII

Answering paragraph XV of plaintiffs' complaint, defendants deny that sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code of the State of California, or any of said sections in so far as they or any of them purport to authorize the threatened seizure and sale of the said "talking sets", or at all, are, or are any of them contrary to or in violation of any portion of or amendment to the Constitution of the United States.

XIII

Answering paragraph XVI of plaintiffs' complaint, defendants deny that the tax heretofore levied by defendants on said "talking sets" is wholly or in part void, and on the contrary allege that said tax, and all thereof, is now due, [fol. 29] owing and unpaid from the American Telephone and Telegraph Company, a New York corporation, to the County of Los Angeles.

XIV

Answering paragraph XVIII of plaintiffs' complaint, defendants deny that plaintiffs have no plain, speedy or adequate remedy at law, but on the contrary allege that they, and both of them have such remedy; deny that this is a case in equity or is within the jurisdiction of this Honorable Court, but on the contrary allege that the bill of complaint does not state any matter of equity entitling plaintiffs or either of them to any relief against these defendants, or at all; defendants further allege that said bill does not state facts sufficient to entitle plaintiffs or either of them to any relief or to confer jurisdiction upon this court.

Wherefore, defendants and each of them, pray that the application of plaintiffs for a temporary or a permanent injunction against these defendants, or any of them, be denied. That the temporary restraining order heretofore issued be dissolved forthwith; that defendants and each of them be hence dismissed with their costs and for such other

and further relief as to this Honorable Court may seem meet and proper.

Edward T. Bishop, County Counsel, and J. A. Tucker, Deputy; Albert W. Leeds, Deputy, Attorneys for Defendants.

[fol. 30] [File endorsement omitted.]

In United States District Court

Notice of Motion to Dismiss—Filed October 20, 1925

To the plaintiffs in the above-entitled matter and their attorneys, Lawler and Degnan:

You and each of you will please take notice that on the 26th day of October, 1926, at the hour of 10 o'clock A. M. of said date, or as soon thereafter as said motion can be heard, in the court room of the Honorable Edward J. Henning, in the Federal Building, City of Los Angeles, State of California, defendants will move the court for an order to dismiss the bill of complaint in the above entitled action on the following grounds, to-wit:

I

That the bill of complaint does not state facts sufficient to entitle the plaintiffs, or either of them, to any relief against these defendants, or any of them, or at all.

II

That the bill of complaint does not state any facts or matter of equity entitling plaintiffs to any injunctive relief against these defendants, or at all, in that it shows on its face that there exists a plain, speedy and adequate remedy [fol. 31] of law, to-wit, the payment of the tax complained of in said bill, and an action pursuant to the statutes of California to recover the amount so paid.

III

That the bill of complaint does not state facts sufficient to confer jurisdiction upon this court.

Said motion will be based upon the bill of complaint, this notice of motion, and the records and files of this cause.

Dated Los Angeles, California, October 17, 1925.

Edward T. Bishop, County Counsel, and J. A. Tucker, Deputy County Counsel, and Albert W. Leeds, Deputy County Counsel.

[File endorsement omitted.]

In United States District Court

Motion to Dismiss—Filed October 26, 1925

Come now the defendants Ed W. Hopkins, Assessor of the County of Los Angeles, State of California, F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California, W. O. Welch, Tax Collector of the County of Los Angeles, State of Californa, H. A. Payne, Auditor of [fol. 32] the County of Los Angeles, State of California and County of Los Angeles, and move this Honorable Court to dismiss plaintiff's bill of complaint in the above entitled matter on the following grounds, to-wit:

I

That the bill of complaint does not state facts sufficient to entitle the plaintiffs, or either of them, to any relief against these defendants, or any of them, or at all.

II

That the bill of complaint does not state any facts or matter of equity entitling plaintiffs to any injunctive relief against these defendants, or at all, in that it shows on its face that there exists a plain, speedy and adequate remedy of law, to-wit: the payment of the tax complained of in said bill, and an action pursuant to the statutes of California to recover the amount so paid.

III

That the bill of complaint does not state facts sufficient to confer jurisdiction upon this court.

Wherefore these defendants pray that plaintiff's bill of complaint be dismissed and that these defendants may have a judgment of dismissal together with their costs of suit incurred herein.

Edward T. Bishop, County Counsel, and J. A. Tucker and Albert W. Leeds, Deputies County Counsel, Attorneys for Defendants.

[fols. 33-35] [File endorsement omitted.]

Bond on temporary restraining order for $5,000, approved and filed July 17, 1925, omitted in printing.

[fol. 36] In United States District Court

Order to Show Cause and Restraining Order—Filed July 17, 1925

To Ed W. Hopkins, assessor of the county of Los Angeles, State of California; F. M. Ross, deputy assessor of the county of Los Angeles, State of California; W. O. Welch, tax collector of the county of Los Angeles, State of California; H. A. Payne, auditor of the county of Los Angeles, State of California and county of Los Angeles, a body corporate and politic, the defendants above named:

Whereas in the above entitled cause it has been made to appear upon the verified complaint filed therein that a writ of injunction preliminary to the final hearing is proper, and that prima facie the plaintiffs are entitled thereto, enjoining the defendants herein from the acts complained of and threatened to be committed:

Now, upon reading and filing the complaint in said suit duly verified, and it satisfactorily appearing to me from

specific facts shown by said verified complaint that there are sufficient grounds for granting an order to show cause why an injunction should not be granted, and that immediate and irreparable injury, loss and damage will result to the plaintiffs before notice can be served and a hearing had upon said complaint, unless the defendants are restrained as hereinafter set forth pending said hearing, and that the threatened injury to plaintiffs is the threatened [fol. 37] seizure and sale by defendants, in satisfaction of an alleged personal property tax of $57,017., of certain so called "telephone talking sets," owned by American Telephone & Telegraph Company, but leased by plaintiffs, and that said injury would be irreparable because said "talking sets" are integral parts of telephone instruments operated by the respective plaintiffs, and are indispensably necessary to the operation of the telephone lines and systems of plaintiffs in the County of Los Angeles, and that the seizure or sale thereof would disrupt and paralyze said lines and systems, thus preventing the transmission of interstate and intrastate messages, depriving plaintiffs of the use of their said properties and of the revenues therefrom, exposing them to the risk of numerous damage suits and causing great damage and inconvenience to the public at large, and it further appearing from said complaint that if notice were given to the defendants of plaintiff's application for a temporary restraining order herein, defendants, or some of them, would immediately proceed to seize and sell said "talking sets" to satisfy said alleged tax, whereby plaintiffs would suffer great, immediate, and irreparable damage, as aforesaid;

It is therefore ordered that the defendants, Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California, F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California, W. O. Welch, Tax Collector of the County of Los Angeles, State of California, H. A. Payne, Auditor of the County of Los Angeles, State [fol. 38] of California, and County of Los Angeles, a body corporate and politic, appear before the United States District Court for the Southern Division of the Southern District of California, in its court room at — on Monday, the 27th day of July, 1925, at the hour of ten o'clock A. M.

of said day, or as soon thereafter as counsel can be heard, then and there to show cause, if any they have, why the preliminary injunction prayed for in said verified complaint should not issue.

And plaintiff's application for such temporary restraining order is hereby granted (without notice for the reasons aforesaid) upon their giving a bond with good and sufficient surety to be approved by the clerk of this court in the penal sum of Five Thousand dollars ($5,000.00), securing the said defendants against all loss or damage which may result from the issue of this order if it should be finally determined that the same is improperly issued.

Now, therefore, it is ordered that you, and each of you, the said Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California, F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California, W. O. Welch, Tax Collector of the County of Los Angeles, State of California, H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic, the defendants herein, your officers, agents, deputies, servants, employees and attorneys, [fol. 39] and all persons acting by or under your authority or direction, be and hereby are specially restrained and enjoined from seizing, or attempting to seize, or selling, or attempting to sell, to collect or satisfy the alleged tax of fifty-seven thousand and seventeen dollars ($57,017.) upon the so called "telephone talking sets" mentioned in said complaint, any of said "talking sets," or otherwise molesting interfering with the same, or with the telephone instruments, or any thereof, of which said "talking sets" are integral parts, pending the hearing and determination of this order to show cause.

It is further ordered that a copy of the complaint on file herein and of this order be served on each of the defendants.

Dated July 17, 1925, at 2 o'clock P. M.

Wm. P. James, Judge.

[File endorsement omitted.]

In United States District Court

Return to Order to Show Cause—Filed July 27, 1925

The defendants, and each of them, in answer to the order to show cause why the preliminary injunction prayed for in the verified complaint of plaintiff should not issue herein, now show to the court that no preliminary injunction should issue herein as prayed for or at all, for the following reasons:

[fol. 40]

I

The bill of complaint does not state facts sufficient to entitle plaintiffs to any relief against these defendants, or at all.

II

The bill of complaint does not state any matter of equity entitling plaintiffs to any relief against these defendants, or at all.

III

The bill of complaint does not state facts sufficient to confer jurisdiction upon this Court.

IV

That plaintiffs have a plain, speedy and adequate remedy at law, to-wit: the payment of the tax complained of in said bill, and an action to recover the amount so paid.

Wherefore defendants pray that the application for the preliminary injunction prayed for in the said verified bill of complaint be denied, and that the temporary restraining order heretofore issued by this Court be discharged.

Edward T. Bishop, County Counsel, by J. A. Tucker, Deputy County Counsel, and Albert W. Leeds, Deputy County Counsel.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

STIPULATION CONTINUING HEARING—Filed July 25, 1925

It is hereby stipulated and agreed between plaintiffs, and all of them, and defendants, and all of them, through their respective counsel, that the hearing upon the Order to Show Cause in the above entitled matter be continued to October 26, 1925, at the hour of 10 A. M. on said day, or as soon thereafter as the calendar of the court will permit.

It is further stipulated and agreed that the temporary restraining order heretofore isued by this Honorable Court be, and remain in full force and effect until said hearing.

It is expressly agreed that the defendants hereto do not, nor do any of them, waive or give up any rights or defenses which they, or any of them, might have had or urged at the hearing upon the above mentioned Order to Show Cause if it were heard on the date originally set in such Order.

Dated Los Angeles, California, July 24th, 1925.

Lawler & Degnan, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel, and J. R. Tucker, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed March 11, 1926

CAPTION

The above entitled cause came on regularly for hearing before the above entitled court, Hon. Edward J. Henning, presiding, on Monday, October 26, 1925, on the order to show cause why the preliminary injunction prayed for in plaintiff's bill of complaint should not issue and on the motion of defendant to dismiss plaintiff's bill of complaint. Alfred Sutro, Esq., and Messrs. Lawler & Degnan, by Oscar Lawler, Esq., appeared as counsel for the plaintiffs, and Ed-

ward T. Bishop, Esq., County Counsel of the County of Los Angeles, by J. A. Tucker, Esq., and Albert W. Leeds, Esq., appeared as counsel for the defendants. Thereupon the following testimony and evidence were presented and proceedings had.

A. J. Reed was called as a witness on behalf of the plaintiffs, and, being first duly sworn, testified on direct examination as follows:

Testimony of A. J. Reed

I am now and have been for sixteen years last past connected with the Southern California Telephone Company and The Pacific Telephone and Telegraph Company. Prior to my connection with them I was for six years with the Western Electric Company, a concern which manufactures telephone appliances on a large scale. I am familiar with telephone equipment and business.

[fol. 43] My present position is that of equipment and building engineer for the Southern California Telephone Company and for the southern division of The Pacific Telephone and Telegraph Company.

The Pacific Company operates throughout the State of California and in the States of Washington, Oregon and Idaho, and in and between those states. The Southern Company operates in Los Angeles County. The systems of the two companies are interconnected and operated as a unit.

In my capacity as equipment and building engineer I am familiar with the equipment used by the telephone companies in the transaction of their business. I prepared those portions of the reports of both plaintiffs to the State Board of Equalization in March, 1925, which dealt with property in the County of Los Angeles. I prepared like portions of the amended reports which were subsequently filed in June, 1925. These reports were made on forms prescribed and furnished by the State Board of Equalization, which came from the Secretary of the Board.

In these reports on the page numbered 5 and under heading 10 appears an item "Poles, conduits, cables, wires, instruments," etc. In the column headed "Number of in-

struments in each city, county and town," I reported the number of instruments for each of the two plaintiff companies, so far as they related to Los Angeles County, and the various municipalities and places therein. Every in- [fol. 44] strument reported by me to the State Board included the so-called talking set, consisting of the receiver, transmitter and induction coil. I reported all the talking sets in Los Angeles County in the reports to the State Board to which I have referred.

So far as the questions in this case are concerned, the amended reports and the original reports were the same.

In item 10, heretofore mentioned, is the word "Poles." That word includes such things as the poles themselves, cross-arms, braces, balconies, steps, anchors, anchor rods, guy wires and insulators. The item "Conduits" covers such items as the various types of conduits, iron conduits, clay conduits, man holes, man hole covers, ladders in the man holes and entrance vaults. Many of these entrance vaults are elaborately constructed. They are tiled and lighted and include considerable underground work.

Here the plaintiffs offered in evidence as their Exhibits 1 and 2 the amended reports of operative property, filed by the plaintiffs Southern California Telephone Company and The Pacific Telephone and Telegraph Company, respectively, with the State Board of Equalization in June, 1925, which had been referred to by the witness. It was stipulated that for all purposes of this case the said amended reports and the original reports filed with the State Board by the two plaintiffs in March, 1925, were the same. Exhibits 1 and 2 are, by stipulation, filed in the Circuit Court of Appeals as original exhibits.

[fol. 45] The Witness (continuing): I hold in my hand an instrument commonly known as a telephone or telephone set. It includes a transmitter, receiver and induction coil and considerable wiring and cords, all mounted in a box. The whole thing is a telephone instrument. Each part of it that I have enumerated, particularly the transmitter, receiver and induction coil, is an integral and essential part of the instrument necessary to its use. The set which I have in my hand and to which I have referred is a wall set and the instrument is a wall instrument.

I now produce the other kind of instrument which is commonly used. In my right hand I hold that part of it commonly known as the bell box, consisting of a bell, condenser and induction coil, suitably connected with wires and cords. In my left hand I hold what is commonly known as a desk stand, consisting of a transmitter, receiver, calling device and a stand or support.

With respect to this latter kind of instrument, the convenience of the patron or subscriber is consulted. If he prefers to have the stand with the receiver and transmitter in one place and the box with the induction coil, condenser and bell in another, we separate them, but they are connected by means of a wire. It is, however, one instrument, the same as a wall set, and each part of it, as I have testified in connection with the wall set, is necessary to the use of the telephone.

[fol. 46] The different parts which I have just described to the court are the instruments as I returned them to the State Board of Equalization.

The defendants having stated that they desired no cross-examination, the witness was excused.

Offer in Evidence

The plaintiffs thereupon offered in evidence fifty tax bills, sent out by the assessor of the County of Los Angeles on behalf of the municipalities mentioned in the amendment to plaintiffs' complaint. These bills were received and collectively marked as Plaintiffs' Exhibit 3. By stipulation this exhibit is filed in the Circuit Court of Appeals as an original exhibit.

Thereupon the following took place:

Mr. Sutro: If your honor please, I have furnished Mr. Tucker, and he has courteously agreed we may make, if it is material, without production of proof, a statement of the taxes paid by these two Companies for the fiscal year ending June 30, 1925, and the first half of the taxes for the fiscal year ending June 30, 1926, which has been paid, and showing the second half which will have to be paid next April. I will just briefly state to your honor that for the

year 1924-1925 the two Companies together paid in gross receipts taxes to the State $2,080,005.72; that for the fiscal year ending June 30, 1926, the current fiscal year, they will have paid to the State $2,340,075.12; that they have to date already paid of that sum $1,170,037.57.

[fol. 47] Mr. Tucker: We object to the introduction of the testimony on the ground it is immaterial.

Mr. Sutro: I will tell you why, Mr. Tucker, it is perfectly material. It is alleged in the bill of complaint that we pay a portion of our gross receipts to the State of California for our taxes but at the time the complaint was drawn it had not been figured by the State Board and we couldn't set it up. If it had been we would have known it. So we have to supplement the allegations of the complaint to that extent by this evidence, and I don't conceive that it could do any possible harm.

The Court: It may be received.

Mr. Sutro: That is all the evidence we have.

Mr. Tucker: We have no evidence, your honor.

Thereupon the following stipulations were made between the parties:

STIPULATION OF FACTS

First. That all the allegations of the amendment to plaintiffs' complaint are admitted, except in so far as the same contain conclusions of law, and that all conclusions of law in the said amendment may be deemed denied.

Second. That plaintiffs, on or about October 26, 1925, made inquiry at the auditor's office and of the treasurer of the County of Los Angeles as to the portion of the tax shown by the several tax bills in Exhibit 3 which belonged to each respective municipality named therein and were informed, "We can't tell you yet," and that plaintiffs made [fol. 48] further inquiry at said offices as to the amount to be deducted as expenses of the county for collection of said taxes and were informed, "We can't tell you."

Third. That this cause may be submitted for decision as follows: Upon defendants' motion to dismiss and, in the

event that said motion should be denied, then, without further hearing, for final determination upon the application of plaintiffs for a permanent injunction as prayed in their complaint.

The foregoing constitutes a full and complete statement of all the evidence, documentary and oral, offered or presented upon the hearing of the above entitled cause and of all the proceedings had thereon.

The foregoing is presented by appellants as and for their statement for use upon their appeal.

Dated March 10th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

STIPULATION RE STATEMENT OF EVIDENCE

It is hereby stipulated by and between the parties hereto that the foregoing statement is a true, complete and properly prepared statement of the evidence, adduced upon the hearing of the above entitled cause; omitting only parts thereof not essential to the decision of the questions presented by the appeal, and it is further stipulated that the [fol. 49] same may be approved by the above entitled court as the statement of evidence to be used on such appeal.

Dated March 10th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel; J. A. Tucker, Deputy County Counsel; Albert W. Leeds, Deputy County Counsel, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement on stipulation of parties is hereby found to be a true, complete and properly prepared statement of the evidence adduced upon the trial of the

above entitled cause and of all the proceedings had thereon, and as such it is hereby approved.

Dated March 11th, 1926.

Edward J. Henning, District Judge.

[File endorsement omitted.]

[fol. 50] In United States District Court

Order Granting Motion to Dismiss—Filed February 3, 1926

This matter comes before the Court on the motion of the defendants to dismiss the plaintiff's bill of complaint for the reason that, as alleged, the bill does not state facts sufficient to entitle plaintiffs to the relief sought, that the bill does not state facts entitling plaintiffs to injunctive relief because they have a plain, speedy and adequate remedy at law, and for want of jurisdiction in this Court.

Upon argument on the motion the facts were stipulated, and by stipulation the case was submitted for decision in the event the motion to dismiss was denied.

The case is one of unusual interest and has been presented with great ability on the part of both sides to the controversy, and in great detail. I have reached the conclusion that I cannot entertain the suit. This conclusion is arrived at somewhat reluctantly, because to me the merits seem so plain.

With all due deference to the learned Judge who has held differently, I am not persuaded that the inability to collect interest on a tax paid under protest is denial of an adequate remedy at law in a case of this nature. The Courts of the State of California are open to the plaintiff, and ultimately the Courts of the United States may be.

This suit involves very important interests to both parties, as well as important legal principles. It seems to me of the utmost importance to all concerned, including [fol. 51] the American people, that the proper corelation of the Courts of State and Nation is of greater importance than any direct issue here involved. I feel that this Court

might take jurisdiction, but I am not persuaded that it would be error not to do so. For that reason, I believe the matter should be left to the Courts of the State of California.

Defendants' motion to dismiss the bill of complaint is granted.

Dated this 3rd day of February, 1926.

Edward J. Henning. Edward J. Henning, U. S. District Judge.

[File endorsement omitted.]

[fol. 52] In United States District Court

[Title omitted]

Minute Entry—February 3, 1926

This cause having come before the court for hearing on the order to show cause why the preliminary injunction prayed for in plaintiff's bill of complaint should not issue and on the motion of the defendants to dismiss the plaintiff's Bill of Complaint, testimony having been taken, evidence introduced and the court having heard the arguments of counsel for the respective parties, having been submitted on briefs to the court for decision, and the court having fully considered the same, on consideration whereof, it is ordered that the defendants' motion to dismiss the bill of complaint be and the same hereby is granted. Counsel for the defendants will prepare the appropriate decree, in accordance with the opinion handed down and filed this date. At the request of the plaintiffs, the restraining order is continued in effect pending appeal to the United States Circuit Court of Appeals.

[fol. 53] IN UNITED STATES DISTRICT COURT

No. J-16-H

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a Corporation, and The Pacific Telephone and Telegraph Company, a Corporation, Plaintiffs,

vs.

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a Body Corporate and Politic, Defendants

A decree is presented to the court in this cause at this time for signature, and said decree having been signed by the court, is ordered filed and entered herein, said decree as filed being as follows, to wit:

DECREE—Filed March 2, 1926

This cause came on to be heard before the court on the order to show cause why the preliminary injunction prayed for in plaintiffs' bill of complaint should not issue and on [fol. 54] the motion of the defendants to dismiss plaintiffs' bill of complaint, and was argued by counsel, Messrs. Lawler & Degnan and Alfred Sutro, Esq., appearing for plaintiffs and Edward T. Bishop, County Counsel, and J. A. Tucker and Albert W. Leeds, Deputies County Counsel, appearing for the defendants.

On argument of said motion, facts were stipulated, testimony taken and evidence introduced, and by stipulation the cause was submitted for decision as follows: Upon said motion to dismiss, and in the event the said motion should be denied, then without further hearing, for final determination upon the application of plaintiff for a permanent injunction as prayed in the complaint.

And, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

That defendants' motion to dismiss plaintiffs' bill of complaint be granted and that the temporary restraining order heretofore issued herein be continued in full force and effect pending an appeal by plaintiffs to the United States Circuit Court of Appeals, or until the time provided by law for such appeal shall have expired, and that defendants have and recover from the plaintiffs, Southern California Telephone Company, a corporation, and the Pacific Telephone and Telegraph Company, a corporation, their costs and disbursements incurred herein amounting to the sum of $25.

[fol. 55] Dated this 2 day of March, 1926.

Edward J. Henning, Judge.

Approved as to form: Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

Decree entered and recorded Mar. 2, 1926.

Chas. N. Williams, Clerk, by Edmund L. Smith, Deputy Clerk.

[File endorsement omitted.]

In United States District Court

Stipulation re Exhibits—Filed March 11, 1926

It is hereby stipulated by and between the parties to the above entitled suit that Plaintiffs' Exhibits 1, 2 and 3, offered in evidence upon the hearing of the above entitled cause, may be sent up on appeal to the Circuit Court of Appeals for the Ninth Circuit as original exhibits and need not be copied in the transcript of the record on appeal.

Dated March 11th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel; J. A. Tucker, Deputy County Counsel; Albert W. Leeds, Deputy County Counsel, Attorneys for Defendants.

[fol. 56] It is so ordered this 11th day of March, 1926.

Edward J. Henning, District Judge.

[File endorsement omitted.]

In United States District Court

Petition for Appeal

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation, plaintiffs in the above entitled cause, feeling aggrieved by the decree of record and entered in said cause on the 2nd day of March, 1926, do, and each of them does, hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the rules of said court.

Inasmuch as in and by said decree the temporary injunction or restraining order heretofore issued by the above entitled Honorable Court in this cause has been continued in full force and effect pending an appeal by plaintiffs to the United States Circuit Court of Appeals, or until the time [fol. 57] provided by law for such appeal shall have expired, your petitioners hereby tender a bond for the continuance of said injunction or restraining order in such amount as the court may think proper for the security of the rights of the opposite parties, and your petitioners pray that with the allowance of this appeal an order be made and entered fixing the amount of such bond.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

In United States District Court

Order Allowing Appeal—Filed March 11, 1926

The appeal prayed for in the foregoing petition is hereby allowed upon a bond being given, as required by law, in the sum of $500.

It is hereby further ordered that said plaintiffs give a bond in the sum of $10,000.00 for the continuance of the

temporary injunction or restraining order herein, as ordered in the decree herein, which bond the court considers proper and hereby finds to be proper for the security of the rights of the opposite parties, in accordance with Equity Rule 74.

Dated March 11th, 1926.

Edward J. Henning, District Judge.

[File endorsement omitted.]

[fol. 58] In United States District Court

Assignments of Error—Filed March 11, 1926

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation, plaintiffs and appellants herein, contend that in the record, opinion, decision and final decree in this cause there is manifest and material error, and said plaintiffs and appellants now make, file and present the following assignment of errors on which they rely, to wit:

I

The District Court erred in rendering and entering the final decree herein dated March 2nd, 1926.

II

The District Court erred in granting the motion of the above named defendants and appellees to dismiss the complaint herein.

III

The District Court erred in not making, rendering and entering a final decree granting to plaintiffs a permanent injunction and the other relief prayed in the complaint herein.

IV

The District Court erred in holding and deciding that it had no jurisdiction of this cause.

V

The District Court erred in holding and deciding that plaintiffs have an adequate remedy at law for the matters [fol. 59] and things alleged and complained of in said complaint as amended.

VI

The District Court erred in holding and deciding that this cause is not within the jurisdiction of a court of equity.

VII

The District Court erred in holding and deciding that the inability to collect interest on a tax paid under protest is not a denial of an adequate remedy at law in a case of this nature.

VIII

The District Court erred in not holding and deciding that plaintiffs have no adequate remedy at law for the matters and things complained of herein, for the reason that, under the law of California, plaintiffs, even if they could pay under protest the alleged tax in said complaint mentioned and sue to recover the same, could not recover interest on the tax so paid.

IX

The District Court erred in not holding and deciding that plaintiffs have no adequate remedy at law, for the reason that substantial parts of said alleged tax are to be collected for the benefit of and turned over to sixteen separate municipalities.

X

The District Court erred in not holding and deciding that any possible remedy of plaintiffs under the state law by paying the said alleged tax and maintaining suit for its re- [fol. 60] covery is too doubtful to be an adequate remedy.

XI

The District Court erred in not holding and deciding that any remedy which would require the plaintiffs to pay the

tax in suit, as a condition to litigating its validity, is an inequitable and inadequate remedy.

XII

The District Court erred in not holding and deciding that the case involves a federal question, by reason of which, since the amount involved exceeds $3,000., the District Court had and should take jurisdiction.

XIII

The District Court erred in not holding and deciding that, inasmuch as the case involves a federal question and the amount involved, exclusive of interest and costs, exceeds $3,000., the jurisdiction of the District Court extends to all questions in the case, including questions of state law.

XIV

The District Court erred in holding and deciding that it could refuse jurisdiction of this case.

XV

The District Court erred in holding and deciding that it was within its discretion whether or not to exercise jurisdiction in this case.

XVI

The District Court erred in holding and deciding that the determination of the questions raised in the case should be left to the courts of the State of California.

[fols. 61 & 62] Wherefore, plaintiffs and appellants pray that said decree be reversed and that said District Court be directed to enter a decree in favor of plaintiffs for the relief prayed in the complaint as amended.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs and Appellants.

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed March 11, 1926, omitted in printing.

[fols. 63-65] Bond on injunction for $10,000, approved and filed March 11, 1926, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the clerk of the above-entitled court:

SIR: Please prepare a transcript of the record upon the appeal of the above named plaintiffs in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, and incorporate therein the following:

1. Bill of complaint for an injunction.
2. Amendment to said complaint.
3. Answer to said bill of complaint.
4. Defendants' notice of motion to dismiss.
5. Defendants' motion to dismiss plaintiffs' bill of complaint.
6. Bond on temporary restraining order.
7. Order to show cause and restraining order.
8. Return of defendants to order to show cause for injunction.
9. Stipulation continuing hearing upon order to show cause.
10. Statement of the evidence, together with stipulation and order approving the same.
11. Opinion of the court, dated February 3, 1926.
12. Minute order dated February 3rd, 1926, directing that the decision be filed and decree entered.
13. Final decree dated March 2nd, 1926.
14. Stipulation regarding exhibits.
15. Petition for appeal and order allowing same, and fix-
[fol. 67] ing amount of bond for continuance of injunction.
16. Assignment of Errors.
17. Citation on appeal.

18. Bond on appeal and stipulation and order approving the same.

19. Bond for continuance of injunction and stipulation and order approving the same.

20. Certificate of the clerk of the above entitled court to record on appeal.

21. Any and all stipulations or orders hereafter filed extending time to file or docket record on appeal.

22. This præcipe.

Dated March 11th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs.

[fol. 68] In United States District Court

Stipulation re Transcript of Record—Filed March 11, 1926

It is hereby stipulated that the portions of the record referred to in the foregoing præcipe may be incorporated in the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the above entitled District Court in the above entitled cause, and that the same may be certified as such. The clerk of said District Court is hereby requested to prepare and certify such transcript, omitting the titles of files and records and inserting in lieu thereof the words "Title of Court and Cause."

Dated March 11th, 1926.

Lawler & Degnan, Alfred Sutro, Attorneys for Plaintiffs. Edward T. Bishop, County Counsel; J. A. Tucker, Deputy County Counsel; Albert W. Leeds, Deputy County Counsel, Attorneys for Defendants.

[File endorsement omitted.]

[fols. 69-72] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] [Caption omitted]

[fol. 74] Minute entry of argument and submission May 10, 1926, omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

No. 4811

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a Corporation, and The Pacific Telephone and Telegraph Company, a Corporation, Appellants,

[fol. 75] vs.

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a Body Corporate and Politic, Appellees

ORDER TO FILE OPINION AND DECREE—June 7, 1926

By direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rudkin, Circuit Judges, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed therein.

[fol. 76] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Before Gilbert, Hunt, and Rudkin, Circuit Judges

Opinion—Filed June 7, 1926

Hunt, Circuit Judge:

This is an appeal from a decree dismissing a complaint, the object of which was to secure an injunction restraining the seizure and sale of more that 300,000 telephone talking sets in satisfaction of a local tax.

[fol. 77] Plaintiffs, California corporations, allege that since 1911 they have paid annually to the State of California in lieu of other taxes on their operative property—that is all property used by plaintiffs in the telephone business—a fixed percentage of the gross receipts from their business. Further facts alleged are: In 1925 plaintiffs had upwards of 300,000 telephone instruments in use in Los Angeles County. A telephone instrument consists of a receiver, a transmitter, an induction coil, a stand (in case of a desk telephone) or a body (in case of a wall telephone) and the necessary wiring. Plaintiffs do not own the talking sets but lease them from the American Telephone and Telegraph Company, a New York corporation. In April, 1925, the assessor of Los Angeles County assessed against the American company personal property taxes of over $52,000 on the talking sets, that is, upon receiver, transmitter and induction coil. The American company failed to pay the tax, whereupon the assessor threatened to seize and sell the talking sets. It is alleged that under the Constitution and laws of California the gross receipts tax required precludes the imposition of any other tax upon the property used in the business of plaintiffs; that the tax involved is without warrant in law; that it would result in double taxation, which is expressly forbidden by the laws of California; that no other property in California is taxed twice and that the threatened seizure and sale would disrupt and paralyze the telephone business within Los Angeles County, thereby de-

[fol. 78] nying plaintiffs the equal protection of the law and taking their property without due process of law, in

violation of the Fourteenth Amendment; that plaintiffs have reported their instruments, including the talking sets, to the California State Board of Equalization as operative property, and have paid, or assert a willingness and ability to pay gross receipts taxes to the state.

The defendants answered and moved to dismiss, upon the grounds of lack of jurisdiction, that plaintiffs had an adequate remedy at law by paying the tax and suing to recover, and that the tax was valid.

After hearing a limited amount of evidence the case was submitted on motion to dismiss, and in the event of denial of that motion, then without further hearing, on application of plaintiffs for permanent injunction.

The argument before us was upon these questions:

1. Does the complaint raise a federal question under the Fourteenth Amendment? 2. Are plaintiffs without an adequate remedy at law? 3. Is the tax invalid under the laws of California? 4. Is the tax invalid under the Fourteenth Amendment?

The case, we think, turns largely upon the construction of section 14, Article XIII of the state Constitution and certain statutes hereinafter cited.

Section 14 of Article XIII, omitting enumeration of other public utilities than telephone companies, provides in part as follows:

"Sec. 14. Taxes levied, assessed and collected as hereinafter provided, upon * * * telephone companies [fol. 79] * * * and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. * * *

(a) * * * all telegraph and telephone companies * * * shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentage hereinafter fixed upon the gross receipts from operation of such companies, and each thereof with this state.

* * * * * * *

Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided.

(f) All the provisions of this section shall be self-executing and the legislature shall pass all laws necessary to carry this section into effect.

Section 3665-b of the Political Code defines operative property, on which, under the above quoted constitutional provisions, the gross receipts tax is "in lieu of all other taxes and licenses, state, county and municipal." Operative property of telephone companies includes (subdivision d):

[fol. 80] "The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings."

Subdivision e of the same section provides:

"* * * * The operative property of the companies enumerated in this section shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section three thousand six hundred sixty-four a of this code."

We are at once directed to a clear understanding of the system of taxation of telephone companies in California by the decision of the Supreme Court in San Francisco vs. Pacific Telephone and Telegraph Co., 166 Cal. 244, where it is shown that the larger purpose of changes wrought by the constitutional amendment, heretofore quoted, was division of the subjects of state and local taxation by imposing upon corporations engaged in certain callings the obligation to pay certain taxes to be applied exclusively to state purposes, and by making provision that persons en-

gaged in, and the property employed in a public service corporation are, to a greater or less degree, to be free from [fol. 81] the burden of local taxation. With respect to telephone companies provision is made for taxes measured by given percentages of gross receipts, the taxes so imposed to be in lieu of all other taxes and licenses, state, county and municipal, upon the property of the corporation in question. The Court further pointed out that the new method under which the taxes are collected exclusively for the state was substituted for former ways, and that the percentages imposed by the amendment "supersede not only other taxes upon the property, but also license fees like those exacted by the ordinances of the city and county." These views were followed in Hartford Fire Insurance Co. vs. Jordan, 168 Cal. 270, where it was again held that the effect of the amendment was to supersede the prior state license tax act so far as it applied to the insurance company. (Pullman Company vs. Richardson, 261 U. S. 330.)

We do not understand that defendants would controvert the proposition to this extent: that the effect of the amendment was to supersede prior taxes and that the talking sets are operative property, and that if they were owned by plaintiffs they could not be assessed. They do insist, however, that the language "their * * * poles * * * wires and other property, or any part thereof used exclusively in the operation of their business in this state" should be construed with relation to the general scheme of taxation in California, which they urge is based upon the principle that the owners of property shall pay taxes. They proceed by arguing that the in lieu clause of sub- [fol. 82] division "a" of the amendment as pertinent to the property "of such companies" is a relief to the public utilities from payment of further taxes on *their* property (italics ours), but not upon property leased and used by such companies. We are constrained to regard the contention as against the real meaning of the amendment and the relevant statutes.

In ascertaining whether actual use of the sets in the business, rather than underlying ownership of them, is the proper criterion by which taxation shall be imposed, we refer to certain statutory requirements. The California Political Code requires that each public utility shall file an

annual report with the State Board of Equalization in such detail as the board shall prescribe, showing, among other things, its operative property. The board must provide for the assessment of the gross receipts tax—in case of telephone companies 5½ per cent of the gross receipts for the preceding calendar year. (Secs. 3665a and 3665-c.)

Upon the argument we were told that for many years these plaintiffs have made the necessary reports in which were included the talking sets (leased from another corporation) as an integral part of the instruments, and the Board of Equalization has assessed gross receipts taxes ($— for the year 1925-1926). Thus in prior practical custom the talking sets have been regarded as operative property, subject to taxation to plaintiff.

In San Bernardino County vs. State Board of Equalization, 172 Cal. 76, the Supreme Court said: "The prime [fol. 83] requisite for property properly classed as 'operative' is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision 'a' of section 14, Article XIII of the Constitution," and that the exertion of the local taxing power in all of the cases included "not the quality or the nature of the property so much as its use." This decision harmonizes with the view that the scheme of taxation laid out in the amendment rests upon the intention to fix the contribution of a telephone company to the revenues of the state by the earnings of its plant, used as an entirety. While courts will not concern themselves with the economic policy pervading a state statute, they may properly consider that in taxing gross receipts upon all operative property in use there is really a payment of a substitution tax upon the whole value of the property in use. (Trimble vs. Seattle, 231 U. S. 683; San Pedro R. Co. vs. Los Angeles, 180 Cal. 18; Pullman Company vs. Richardson, 185 Cal. 484.)

Questions of assessment and taxation of operative property leased and operative property held in fee have been before the courts in several instances. Difference in the phraseology of the statutes of the several states may lessen the value of the decisions as authorities in the present case, but the reasoning of the courts is quite apposite. Merrill Railway vs. City of Merrill, 119 Wis. 249, was a case where the city assessed land leased to the street railway company.

The state statute required gross receipts taxes on street railways and provided that all property "owned and actually and necessarily used by such corporation in the opera-[fol. 84] tion of its business shall be exempt from taxation and other license fees." In a suit the railway company joined the lessors of certain property used by the street railway to have the tax declared void. The Court held that the tax was improperly assessed and rested decision upon the ground that the whole purpose of the scheme of taxation was to measure the contribution of street railways and public revenues by the earning capacity of their plants as entireties, and regarded leased property as falling within the purpose of the exemption as readily as that which was owned absolutely, while the property was actually used for the purposes of the enterprise. The Court said: "What difference would it make that the power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto of this particular property. Why should the legislators care whether the dynamos in the power-house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded." City of Superior vs. Allouez Bay Dock Co. (Wis.), 164 N. W. 362.) In People ex rel. Collector vs. Wiggins Ferry Co. (Ill.), 100 N. E. 956, a railroad company reported a portion of its right of way which it held under lease from the defendant. The land was assessed to defendant and in due course the assessor obtained judgment for local taxes upon the land. The Supreme Court considered the statute of the state which required railroad companies to file with the State Board of Equaliza-[fol. 85] tion sworn schedules of their tracks, and held that the mere fact that the appellant owned the fee and that the railroad was in possession under lease or otherwise did not authorize the assessor to assess the right of way. "Real estate used by a railway company for a right of way," said the Court, "is railroad track for the purposes of assessment, and is assessable only by the State Board of Equalization even though the railroad company is a tenant by sufferance or has a lease and the title to the land is owned by another corporation or individual." In People vs. Illinois, Northern R. Co. (Ill.), 94 N. E. 37, the

Court, after setting forth that the jurisdiction of the Illinois State Board of Equalization was exclusive over the class of property designated as railroad track for assessment purposes, whether held by a railroad company in fee or for years or otherwise, said: "In other words, that the use to which the property is devoted, and not where the fee title rests, determines which of the assessing bodies—that is, the State Board of Equalization or the local assessor—shall assess property in use by the railroad company for right of way purposes." (People vs. Terre Haute (Ill.), 100 N. E. 173.)

Upon the point of jurisdiction we are aided by the highest authority. In Green, Auditor, vs. Louisville etc. Co., 244 U. S. 499, the railroad companies brought suit against the members of the Kentucky Board of Valuation and Assessment and the legal officers of the state to enjoin them from certification and enforcement of certain state franchise taxes assessed under the Kentucky statutes. It was [fol. 86] alleged that the state officials had discriminated against plaintiffs by assessing their intangible property at a rate higher than that employed by other taxing authorities of the state in assessing similar property. Jurisdiction was invoked under the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs also asserted that the threatened action of the defendants was in violation of the uniform taxation provisions of the Constitution of the State of Kentucky. Jurisdiction was held in the federal court, the Supreme Court saying that the contention that the action of the Board of Valuation and Assessments referred to in the complaint and the threatened action of the local government authorities in respect to carrying the assessments into effect, constituted action by the state, and if carried out would violate the equal protection provision of the Fourteenth Amendment, and that there was a real and substantial controversy presented under the Constitution of the United States which conferred jurisdiction upon the federal court irrespective of the citizenship of the parties. The Court further held that as jurisdiction existed, it extended to the determination of all questions involved in the case, including the question of state law, "irrespective of the disposition that may be made of the federal question or whether it be found necessary to decide it at all." Ray-

mond, Treasurer, vs. Chicago Traction Co., 207 U. S. 20, was cited. In that case suit was brought to enjoin the treasurer of Cook County, Illinois, from taking further proceedings toward the collection of certain taxes assessed [fol. 87] against the traction company upon an assessment alleged to be in violation of the Fourteenth Amendment, which, if enforced, would result in the taking of property without due process of law and in denying it the equal protection of the law. There was no allegation of diversity of citizenship. The Supreme Court held that the action of the State Board of Equalization and Assessment in assessing property of the traction company was the action of the state, and that as it appeared that if it were carried out the provisions of the Fourteenth Amendment would be violated by taking property without due process of law and by failing to give equal protection of the law, a federal question was presented "beyond all controversy."

Respondents cite Barney vs. New York, etc., 193 U. S. 430, as supporting the argument that all possible remedies under the state law must be exhausted before plaintiffs are entitled to relief in the federal courts. But the force of the Barney case has been greatly weakened by the discussion in Home Telephone Company vs. County of Los Angeles, 227 U. S. 278, where there was no diversity of citizenship alleged. The Telephone Company sued to enjoin the enforcement of a rate fixing ordinance on the ground that the ordinance was contrary to the Fourteenth Amendment. Defendant answered that the ordinance, if contrary to the Fourteenth Amendment, was contrary to similar provisions of the state Constitution, and that the Telephone Company must proceed under the state law. The Court, speaking through Chief Justice White, said: [fol. 88] "That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." The Barney case, supra, was expressly held to have been

so distinguished or qualified by the Raymond case, supra, as not to be even persuasive in the argument that the federal court will not interfere merely because of a contention that it is the duty of the plaintiff to exhaust all possible remedies under the state law before he is entitled to relief in the federal court. Other cases might be cited, but those selected are authority for holding that a federal question is presented.

Palintiffs aver that they have no adequate remedy at law for the reason that upon payment of the tax they could recover, if at all, only by a multiplicity of suits against the defendant county and sixteen municipalities from which the tax is collected, that no interest on the tax could be recovered, and that it was doubtful whether plaintiffs, not being owners of the talking sets, could maintain an action under the statutes of California.

Parts of the tax in suit, if collected by Los Angeles county, would be for the benefit of and turned over to sixteen separate municipalities. (Cal. Stats. 1895, p. 219, as [fol. 89] amended; Deering's Gen. Laws, 1925, Vol. II, p. 3531.) Under that act a tax rate is fixed by each municipality and municipal taxes are to be collected at the same time and in the same manner as county taxes, and when collected are to be paid to the treasurer of the municipal corporation to which the tax belongs, under the general requirements provided by law for the settlement of other taxes. By a general law of the state a tax collector must pay all the taxes in his hands to the county treasurer on the first Monday of each month and make such payment at least once a month and oftener, in his discretion. (Cal. Pol. Code, secs. 3753 and 4126.) Under section 1, Act of March 27, 1895, supra, as amended, a municipality may at any time withdraw from the arrangement whereby the county collects its taxes.

Section 3804 of the Political Code provides that any taxes erroneously or illegally collected may, by order of the board of supervisors, be refunded by the county treasurer, and whenever payment shall have been made to the state treasurer by the county treasurer, as provided by sections 3865 and 3866 of the Political Code, and it shall afterwards appear to the satisfaction of the board of supervisors that a portion of the moneys so paid should be refunded as pro-

vided in the section, the board may refund such portion of the taxes, penalties and costs so paid to the state treasurer to the person paying the same out of the general fund and shall thereafter report the same to the proper authorities and in the next settlement between the county treasurer and the comptroller, the comptroller, if satisfied of the [fol. 90] legality of such refunding by the board, shall give the treasurer credit for the state's portion of the amounts so refunded as prescribed in section 3871 of the code. Under section 3819, Political Code, at any time after the assessment book has been received by the tax collector and the taxes have become payable, the owner of any property assessed therein who may claim that the assessment is void, may pay the tax to the tax collector under protest in writing, specifying whether the whole assessment is claimed to be void, or if a part only, what portion; and such owner may within six months bring action against the county in the superior court to recover the tax so paid under protest, and if it be adjudged that the assessment or any part thereof referred to in the protest was void on a ground specified in the protest, judgment shall be entered against the county therefor. On the payment of any such judgment such part of the tax recovered thereby as may have been paid by the county treasurer into the state treasury shall be regarded as an amount due the county for the state and shall be deducted in the next settlement had by the county and the state.

It is doubtful whether these plaintiffs, not being "owners" of the property assessed, could obtain relief under section 3819. (Warren vs. City and County of San Francisco, 150 Cal. 167.) It may be that recovery could be had under section 3804 as construed in Hayes vs. County of Los Angeles, 99 Cal. 74, where it was held that where the public interest or private right requires that a thing shall be done, the word "may" is generally construed to [fol. 91] mean "shall," and that the board of supervisors are empowered to refund, and in Steward Law & Collection Co. vs. Alameda, 142 Cal. 660, where in an action based on section 3804, taxes were illegally assessed and claim was presented to the board for refund and was refused, the Court held that the statute furnished a summary remedy authorizing a refund. It was also held that section 3804

was intended to give relief without the necessity of resorting to the courts while 3819 was meant to afford a remedy in certain cases through the courts, but that the remedies furnished by the sections were independent and not to be regarded as exclusive.

Plaintiffs argue, however, that 3804 is not applicable where a lessee claims that the assessment is void in whole or in part. That question does not seem to have been directly decided, and in the absence of a positive ruling by the Supreme Court of the state, of course, no construction by us could settle the point. Again, if plaintiffs should pay the taxes in suit there would seem to be no certain way of obtaining complete refund except by suits against the county and the various municipalities. This would require plaintiffs to bring many suits, and in the event of recovery there would be no provision by which plaintiffs could recover the sums allowed the counties for the costs of collection.

It is well established that where adequate remedy at law is not clear, and equity can furnish relief, a plaintiff ought not to be compelled to take the chance of obtaining relief at [fol. 92] law. (Davis vs. Wakelee, 156 U. S. 680; Atlantic Coast Line vs. Daughton, 262 U. S. 413.)

The collection of interest is entitled to special consideration. By the laws of California one who recovers a wrong fully collected tax, paid under protest under section 3819, cannot recover interest until after judgment (Engbretson vs. San Diego etc., 185 Cal. 475; Spencer vs. Los Angeles County, 180 Cal. 115). In Birch vs. Board of Supervisors, 191 Cal. 235, the Supreme Court, reviewing an order of the superior court where proceedings presented the validity of an order of the supervisors increasing an assessment upon the property of plaintiffs, held that the petitioner, not being entitled to recover interest upon the increased tax, had no adequate remedy by suit to recover the tax.

In Proctor and Gamble Distributing Co. vs. Sherman, 2 F. (2) 165, plaintiff brought suit to enjoin the Attorney General of the state and members of a state commission from collecting certain corporation taxes on the ground that the defendants in calculating the taxes ignored the distinct entities of the plaintiff and its subsidiaries. The

officials set up that the plaintiff had an adequate remedy at law by paying the tax and bringing suit to recover. It was held that an express refusal to allow interest was a denial of an adequate remedy. Judge Hand said: "While I have been referred to no decision on this point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how [fol. 93] long after, he establishes that he ought never to have been required to pay it at all."

The conclusion we draw from the language of the Constitution and the statutes is that the gross receipts tax is a proper tax on the talking sets and that the levy threatened by the local authorities would result in the imposition of a double tax on the same property, effected not merely by a mistake, but with intent to adopt as a practice an unlawful discrimination, and that remedy by injunction will lie. (Chicago G. W. R. vs. Kendall, 266 U. S. 94.)

As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion, and left a bounden duty to proceed to a decree. (Cohen vs. Virginia, 6 Wheat. 264; Willcox et al. vs. Con. Gas Co., 212 U. S. 19; Kline vs. Burke Con. Co., 260 U. S. 226.)

The decree will be reversed, and the cause remanded with directions to proceed with the case and to grant injunction prayed for by plaintiffs.

Reversed and remanded.

[File endorsement omitted.]

[fol. 94] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Appeal from the District Court of the United States for the Southern District of California, Southern Division

Decree—Filed June 7, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Southern Division and was duly submitted.

[fol. 95] On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellants and against the appellees, and that this cause be, and hereby is remanded to the said District Court with directions to proceed with the case and to grant the injunction as prayed for by plaintiffs.

It is further ordered, adjudged and decreed by this Court that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 96] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—July 12, 1926

On consideration of the petition, filed July 6, 1926, on behalf of the appellees for a rehearing of the above-entitled cause, and of the appellants' reply to appellees' petition for rehearing, filed July 8, 1926, and good cause therefor appearing, it is ordered by direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rud-

kin, Circuit Judges, before whom the cause was heard, that the said petition for rehearing be, and hereby is denied.

[fols. 97 & 98] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 29, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 133.

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic,

Petitioners,

vs.

Southern California Telephone Company (a corporation), and The Pacific Telephone Company (a corporation),

Respondents.

STIPULATION.

It is hereby stipulated by and between plaintiffs and defendants herein through their respective attorneys as follows:

I.

That the references to the transcript on file in the Supreme Court of the state of California in *Birch v.*

Board of Supervisors, reported in 191 Cal. 235 (Records of the Supreme Court, state of California, L. A. 7168), appearing on page 94 of brief for petitioners after granting of writ of *certiorari* on file herein, are true and correct statements of the matter contained in such transcript.

II.

That the quotation from page 32 of respondents' reply brief filed in *Birch* v. *Board of Supervisors*, reported in 191 Cal. 235 (Records of Supreme Court of the state of California, L. A. 7168), appearing on pages 94-5 of brief for petitioners after granting of writ of *certiorari* on file herein, is a true and correct copy of the matter so quoted from page 32 of said respondents' reply brief.

III.

That the quotation from the argument in favor of the adoption of the amendments to the California Constitution at the election of 1910, signed by J. B. Curtin, state senator, appearing on pages 152-3 of brief for petitioners after granting of writ of *certiorari* on file herein, is a true and correct copy of the portion of said argument so quoted.

Dated this 10th day of November, 1927.

Everett W. Mudlow

W. Lawrence Holbrook

Attorneys for Petitioners.

Lawler & Degnan

Pillsbury, Madison & Sutro

Attorneys for Respondents.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No.....

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic,

Petitioners,

vs.

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners in the above entitled case most respectfully show to this Honorable Court as follows:

I.

The respondents, hereinafter called plaintiffs, brought this action against the petitioners, hereinafter called defendants, in the District Court of the United States, for the Southern District of California, Southern Division, to enjoin the seizure and sale of approximately three hundred thousand telephone "talking sets" in satisfac tion of a local tax.

II.

Plaintiffs are California corporations engaged in the telephone business.[R. 4, 5, 6.] Article XIII, section 14, of the Constitution of the State of California provides that all telephone companies operating in the state shall annually pay to the state a tax upon their property used exclusively in the telephone business, to be computed upon the gross proceeds from the operation of such companies. This tax is in lieu of all other taxes upon the property so used of such companies.

III.

During 1925 plaintiffs were using approximately three hundred thousand telephone instruments in Los Angeles County. A telephone instrument consists of (1) a receiver, transmitter and induction coil which defendants have designated collectively, a telephone "talking set" and upon which the tax in question was levied; (2) a stand, in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. [R. 6-7.]

IV.

The telephone "talking sets" are owned by the American Telephone and Telegraph Company, a New York corporation which does not operate in California. The American Telephone and Telegraph Company leased the "talking sets" to plaintiffs. [R. 7.]

V.

The defendants Hopkins, Welch and Payne are respectively the assessor, tax collector and auditor of the County of Los Angeles. [R. 4.] The taxes for sixteen municipalities are assessed and collected by them simultaneously with the county taxes. [R. 21.] In April, 1925, the defendant Hopkins as assessor of Los Angeles County assessed against the American Telephone and Telegraph Company, the owner of said "talkings sets", a personal property tax of $52,224.45 thereon. [R. 7-8-9-10.]

The tax was levied on the theory that the taxes levied by the state pursuant to the above mentioned section of the California Constitution did not include a tax upon property not owned by such telephone companies; that said section did not relieve the owner of such property from paying a local tax thereon; and therefore, the American Telephone and Telegraph Company being the owner and a non-operating company, should pay a tax upon its property.

VI.

The American Telephone and Telegraph Company did not pay the tax and the assessor threatened to seize and sell the "talking sets".

Plaintiffs' bill of complaint to enjoin the sale alleged that the gross receipts tax above mentioned precludes the imposition of any other tax on property used in the telephone business, the local tax was therefore void, and that the seizure and sale of the "talking sets" to satisfy the tax would deny the plaintiffs the equal protection of the laws and take their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. [R. 13.]

VII.

Defendants answered [R. 24] and moved to dismiss on the grounds that the court was without jurisdiction, that plaintiffs had an adequate remedy at law by paying the tax and suing to recover and that the tax was valid. [R. 31.]

VIII.

At the hearing of the order to show cause why a temporary restraining order should not issue, a limited amount of evidence was introduced. [R. 42.] By stipulation, the case was submitted for decision as follows:

On the motion to dismiss, and in the event that the motion should be denied, then without further hearing on plaintiffs' application for a permanent injunction. [R. 47.]

IX.

The portions of section 14 of Article XIII of the California Constitution involved, read as follows:

"* * * all telegraph and telephone companies
* * * shall annually pay to the state a tax upon

their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof, within this state. * * * Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the *property above enumerated of such companies* except as otherwise in this section provided; * * *" (Italics ours.)

X.

The District Court granted defendants' motion to dismiss and a decree was entered accordingly. [R. 53.] Plaintiffs appealed to the Circuit Court of Appeals for the Ninth Circuit, which court on the 7th day of June, 1926, reversed the judgment of the District Court [R. 94] and upon petition for rehearing made and filed by your petitioners, denied such petition July 12th, 1926 [R. 96], and remanded the record to the court below with instructions to proceed with the case and grant the injunction prayed for.

XI.

That your petitioners aver that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons among others:

1.—That the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court and of other Circuit Courts of Appeals, in that said Circuit Court of Appeals

held that a Federal question was involved, whereas the only issue was the interpretation of a section of the California Constitution.

2.—That said Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions and plain statutory provisions, in that said court held,

(a) that it is doubtful if plaintiffs might have an action at law pursuant to section 3804 of the California Political Code to recover the taxes paid, whereas said section has been expressly construed so to hold;

(b) that section 3804 is not applicable where the lessee claims the assessment is void in whole or in part;

(c) that plaintiffs would be required to bring separate actions against each of the municipalities for whom the taxes were collected;

(d) that there is no provision of the California law whereby the plaintiffs could recover the full amount of the tax paid, particularly the amount paid by each municipality to the County for the cost of collection.

3.—That the Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the weight of authority in that said court decided that plaintiffs had no plain, speedy or adequate remedy at law notwithstanding the fact that this court has repeatedly held that a state statute permitting an action in the state courts for the recovery of the taxes paid, constitutes an adequate remedy at law.

4.—That the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision in that the effect of its decision will be to permit the bringing of injunctive actions involving the interpretation of state tax statutes in the Federal courts in the first instance, thus preventing their presentation to the state tribunals for interpretation.

5. That the Circuit Court of Appeals has decided another important question of local law in a way probably in conflict with the Constitution of California and applicable local decisions in that the court decided that said "talking sets" were subject to state taxation and not local taxation.

XII.

Your petitioners present herewith as a part of this petition, a transcript of the record in the Circuit Court of Appeals.

Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals for the Ninth Circuit commanding said court to certify and send to this court on a date to be therein designated, full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in this case, which was entitled in that court, "Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation, appellants, vs. Ed. W. Hopkins, Assessor of the County of Los Angeles,

State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic, appellees," to the end that said cause may be reviewed and determined by this court as provided by law and that your petitioners may have such other and further relief in the premises as to this court may seem appropriate and that the said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

EVERETT W. MATTOON,
County Counsel of the County of Los Angeles, State of California,
Attorney for Petitioners.

J. A. TUCKER,
Deputy County Counsel,
and
ALBERT W. LEEDS,
Of Counsel for Petitioners.

State of California, Southern District, Southern Division,
County of Los Angeles—ss.

Ed. W. Hopkins, being first duly sworn, says: I have read the foregoing petition. The same is true to my own knowledge, information and belief. My knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the District Court in which the motion to dismiss this action was heard.

Ed. W. Hopkins

Subscribed and sworn to before me this 1st day of October, 1926.

L. M. Bullock (S

Notary Public in and for the County of Los Angeles, State of California. My Commission Expires Jan 23d 1929

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petitioners should be granted by this court.

EVERETT W. MATTOON,
County Counsel of the County of Los Angeles,
Attorney for Petitioners.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No.....

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic,

Petitioners,

vs.

Southern California Telephone Company, a corporation, and The Pacific Telephone and Telegraph Company, a corporation,

Respondents.

Brief in Support of Petition for Writ of Certiorari.

Grounds of Jurisdiction.

This petition for certiorari seeks the review by the Supreme Court of the judgment of the Circuit Court of Appeals for the Ninth Circuit, pursuant to its opinion

found at page 76 of the transcript of record, reversing the judgment of the District Court of the Southern District of California.

Petitioner invokes the jurisdiction of the Supreme Court as follows:

The judgment of the Circuit Court of Appeals to be reviewed is dated June 7th, 1926. Petitioner's petition for rehearing was denied July 12, 1926. [R. 96.] The statutory provision under which jurisdiction of the Supreme Court is involved is section 240 of the Judicial Code (as amended by the Act of February 13, 1925, subdivision a).

Statement of the Case.

The respondents, hereinafter called plaintiffs, brought this action against the petitioners, hereinafter called defendants, in the District Court of the United States, for the Southern District of California, Southern Division, to enjoin the seizure and sale of approximately three hundred thousand telephone "talking sets" in satisfaction of a local tax.

The plaintiffs, Southern California Telephone Company and Pacific Telephone and Telegraph Company, California corporations, at all times herein mentioned, operated a telephone business within the state of California, including the county of Los Angeles. As an essential part of their business in the county of Los Angeles they operated over 300,000 telephone "talking sets" each consisting of (1) a receiver, transmitter and induction coil which defendants have designated collectively, a telephone "talking set" and upon which the

tax in question was levied; (2) a stand in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. [R. 6-7.] These telephone "talking sets" were not owned by the above named companies but were owned by the American Telephone and Telegraph Company, a New York corporation not operating within the state of California, and were leased by it to the operating company. [R. 7.]

In April, 1925, the defendant county assessor assessed against the American Telephone and Telegraph Company, a personal property tax of $52,224.45 on the "talking sets." [R. 7-8-9-10.] The tax was not paid, the operating companies claiming that it was precluded by the gross receipts tax they had paid in accordance with Article XIII, section 14 of the Constitution of the State of California, which lays a tax upon the properties of certain enumerated public utility corporations in lieu of local taxes. [R. 13.] The county officials claimed that the provisions of this law applied only to property owned by such corporations and did not apply to property owned by others though used in such public utility business. It is not disputed that this point has never been decided or discussed by the Supreme Court of California, or so far as is known, by any California court.

The operating companies filed a bill in the United States District Court for a permanent injunction and obtained a temporary restraining order preventing the county officials from collecting the tax by levy and seizure.

The defendants moved to dismiss the bill on the grounds (1) that the tax was legally due; (2) that the

bill stated no facts entitling plaintiffs to equitable relief as a plain, speedy and adequate remedy at law existed under the laws of California, by payment of the tax and suit for refund, and (3) that the bill stated no facts showing jurisdiction in the United States Court. [R. 31.]

After due hearing and argument, the District Court rendered its decision dismissing the bill. [R. 53.] The telephone companies then appealed to the Circuit Court of Appeals. The Circuit Court of Appeals reversed the judgment of the District Court and directed the lower court to enter a permanent injunction against the collection of the tax. [R. 94.] In its opinion, the Circuit Court of Appeals decided directly or by necessary implication, (1) that Article XIII, section 14 of the California Constitution covered the tax on these "talking sets" and that the tax was therefore illegal under state law; (2) that the remedies in this case under the laws of California for actions for refund of taxes illegally collected do not constitute an adequate remedy at law and hence plaintiffs were entitled to equitable relief by injunction, and (3) that the District Court had jurisdiction of the case.

Errors Urged.

The errors which are intended to be urged before the Supreme Court are:

1. That the Circuit Court of Appeals erred in holding and deciding that the District Court had jurisdiction of the cause.

2. That the Circuit Court of Appeals erred in holding and deciding that the payment of the taxes and a suit for their refund did not furnish plaintiffs an adequate remedy to contest the validity of the taxes and that plaintiffs were entitled to equitable relief by injunction to prevent the collection of the tax.

3. That the Circuit Court of Appeals erred in holding and deciding that the tax in question was not authorized by the California law.

Summary of Argument.

Petitioners' argument may be summarized as follows:

1. That no facts have been alleged showing a violation of the provisions of the Constitution of the United States or any Federal statutes. The only question is whether the Constitution of California has authorized the tax. There has been no substantial claim that assuming it does, the tax would then be violative of the Fourteenth Amendment. Where a state officer is doing an act which is authorized by a state statute as construed by him, and such construction does not violate the Federal Constitution, no Federal question is presented. It is a question of interpretation for the state courts.

2. That plaintiffs can pay the tax and file an action against the County of Los Angeles in the California courts for its recovery pursuant to the provisions of section 3804 of the California Political Code. If the tax be declared void, a recovery of the entire amount paid will be had in one action. This constitutes an ade-

quate remedy at law and injunctive relief will not be granted.

3. That the California Constitution authorizes the tax as levied. Not only the language of section 14 of article XIII, but the history and scheme of taxation in California contemplates that the owner shall pay a tax on his property. The state tax does not include a tax on property not owned by the public utilities nor does section 14 exempt it from local taxation. Section 1 of article XIII of the California Constitution provides that all property within the state with the exception of that described in section 14 and certain other provisions not pertinent to this case, shall be taxed in proportion to its value. It therefore follows that the "talking sets" are subject to local taxation.

ARGUMENT.

Introductory Statement.

Although the substantive question involved in this case, that is, whether the telephone "talking sets" were properly taxable under the general property tax, is intrinsically of great importance and its determination will affect the taxability of property of many millions of dollars in value, nevertheless, the decisions of the Circuit Court of Appeals in its opinion on the question of Federal jurisdiction and the adequacy of the California statutes providing for suit for refund of taxes, so far transcend in importance the substantive question involved, that defendants in their petition for a writ of certiorari intend to lay their principal emphasis on these

questions. With regard to the merits of the substantive question we may observe that it is one of great intricacy and its proper determination requires a thorough study of the theory and system of taxation in the State of California as well as the manner in which California tax laws have been interpreted by the courts of the state. With regard to the authorities cited by the Circuit Court of Appeals in its determination of state law, it is submitted that a decision of the Supreme Court of Illinois rendered since the opinion herein by the Circuit Court of Appeals (People *ex rel.* Shipton County Collector v. Dunleigh and Dubuque Bridge Company, 152 N. E. 526, decided June 16th, 1926) demonstrates that rather than being authority for plaintiffs' position herein, the Illinois courts apply the test of ownership rather than use in construing statutes similar to that involved here.

The question here involved as to the taxability of the "talking sets" is purely a question of state law and it would seem to be peculiarly within the province of the courts of the state of California to interpret the laws of the state on such questions. Yet, under the decisions of the Circuit Court of Appeals such a determination might well be forever prevented because any taxpayer, by an allegation of the invalidity of any tax under state law could obtain an injunction in the Federal courts and have all questions of state law determined there.

The effect of the decision of the Circuit Court of Appeals if followed will be the withdrawal of millions of dollars worth of property in California from taxation, for it has been the uniform practice to tax for local purposes to the owner thereof, office buildings and other property leased by public utility corporations and used by them in the operation of their business.

I.

The Circuit Court of Appeals Erred in Holding Federal Jurisdiction Was Shown by the Allegations of the Bill of Complaint.

The opinion of the Circuit Court of Appeals decided that the tax in question is not authorized by the California Constitution and then holds that this fact is of itself enough to confer Federal jurisdiction. No substantial claim has been made throughout the entire litigation that the tax in question if authorized by state law, would violate the Federal Constitution. If any passages in the court's opinion seem to point to such a holding, we submit that such decision is flatly contrary to *Bank of California v. Richardson*, 248 U. S. 476, affirming in part *Bank of California v. Roberts*, 173 Cal. 398, which held that what plaintiffs here call double taxation is not violative of either the California or the Federal Constitution. If such construction could be put upon the opinion of the Circuit Court of Appeals it would of course be the intention of defendants to carry the case to this court by appeal.

The position that a tax levied by a state official in violation of state law only establishes jurisdiction in Federal courts is, we submit, not only directly contrary to the authorities but subversive of the principles according to which the powers of government are separated between the state and federal authorities and the jurisdiction of the federal courts established.

If the District Court had jurisdiction of the cause at all, it was under subdivision 1 of section 24 of the

Judicial Code. On the question of federal jurisdiction under this subdivision this court has held in the leading case of *Starin v. New York*, 115 U. S. 248,

> "The character of a case is determined by the questions involved. *Osborn v. Bank of United States*, 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not."

The present case comes squarely within this rule for no construction of the Constitution or laws of the United States is in any way involved in its decision. If the Constitution of California is given one construction, the American Telephone & Telegraph Co. is not required to pay taxes on its property, if another, it must pay a tax valid under the laws of the state and the United States.

Defendants in the courts below cited the cases of *Barney v. City of New York*, 193 U. S. 430, and *Memphis v. Cumberland Telephone Company*, 218 U. S. 624, as controlling authorities upon the question presented. These cases stand for the proposition that where the bill of complaint shows a violation of state law only no federal question is presented. Upon this question these cases are, we submit, unquestioned law today. The language used in the Barney case was somewhat broader than was called for and gave rise to a line of cases in the

lower federal courts which held that where the same act constituted a violation of both the state and federal Constitutions, the plaintiff must seek his remedy in the state courts first. This court overruled these cases and in cases such as *Home Telephone Company v. City of Los Angeles*, 227 U. S. 278, *Greene v. Louisville, etc. R. Company*, 244 U. S. 499, laid down the rule that when an act is complained of which in itself violates the Fourteenth Amendment, that is, an act which the state itself could not have authorized, the defendant state officer cannot escape federal jurisdiction by the claim that his action was not authorized by the state. These cases were apparently considered by the Circuit Court of Appeals as overruling the Barney and Memphis cases. Defendants here are far from questioning the soundness or authority of the rule just stated, but contend that it has no application to the case at bar. In every case we have discovered in which the rule has been applied, the act in question was one which the state could not have authorized and the question of whether the state had attempted to do so was entirely immaterial from the standpoint of federal jurisdiction. Here the sole question is whether the California Constitution has authorized the defendant officials to levy these taxes. If it has done so there is no substantial claim that plaintiffs can question their action under the Federal Constitution. The language of this court in the case most relied on by plaintiffs and cited by the Circuit Court of Appeals plainly shows this distinction. In *Home Telephone and Telegraph Company v. City of Los Angeles*, 227 U. S. 278, at page 288, this court has said:

> "To repeat: For the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer, in virtue of state power, is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority."

In the case at bar, far from testing the question by presuming that the state officer possessed this state power, the whole decision below is based on the assumption that the state officer did not have this power.

The precise question here involved has once before been before this court. In *St. Joseph and Grand Island Railroad Company v. Steel*, 167 U. S. 659, the plaintiff railroad filed its bill in the Circuit Court to restrain the defendant sheriff from levying on its bridge in satisfaction of a local tax, plaintiff claiming that the bridge was properly assessable only by the state railroad assessors. This court remanded the case to the court below with instructions to dismiss for want of jurisdiction. There was no extended discussion of the principles involved, the court merely saying it was a question of state law. But the question decided is the same question here presented and the decision of the Circuit Court of Appeals is, we submit, directly contrary to this authority.

The far-reaching and revolutionary effects of the decision of the Circuit Court of Appeals if adopted, can easily be foreseen. It would result in the trial of all manner of questions of state law relating to the power

of state officers in the federal courts, for if the act of the assessor in levying taxes on property not so taxed by state law, constitutes a violation of the Fourteenth Amendment so equally does the act of the sheriff, for instance in taking a person into custody in a case or manner not provided for by the state law and if the persons concerned choose to resort to the federal courts, would prevent the state courts from ever interpreting their own laws. Such procedure is, we submit, contrary to the letter and spirit of the decisions of this court and renders opposite the statement rendered through Mr. Justice McReynolds, no longer ago than May, 1926, in the case of *Tenner v. Boykin*, (70 L. Ed. Adv. 599) wherein an attempt was made to remove a prosecution under a state statute to the federal courts upon the strength of the Fourteenth Amendment.

> "An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court."

The situation at bar is much stronger than that which impelled this court to use such decisive language as there the validity of the state law was assailed, while here the controversy begins and ends with its interpretation.

II.

Section 3804 of the Political Code of California Gives a Right of Action to Plaintiffs to Recover the Taxes.

The pertinent portion of this section reads as follows:

"Any *taxes, penalties* or *costs* thereon heretofore or hereafter * * * erroneously or illegally collected * * * may, by order of the board of supervisors, be refunded by the county treasurer. * * * When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or *any municipal or other public corporation*, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other corporation."

"No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor verified by the *person who has paid said tax*, * * * which said claim must be filed within three years after the making of the payment sought to be refunded."

* * * * * * * *

"In no case shall any judgment be rendered in favor of plaintiff in any action brought for the enforcement or allowance of any rights or claims under this section * * * if the said action be brought by an assignee of the person paying said tax, or by any person *other than the person who has paid said tax*, or by his guardian, or in case of his death, by his executor, or administrator." (Italics ours.)

This section authorizes a refund to *any* person paying an illegal or erroneous tax. No distinction is made between lessee and lessor. The purpose of the section is to permit the refund of taxes which the public body is not equitably entitled to retain. (*Stewart Law & Collection Company v. County of Alameda*, 142 Cal. 660, 76 Pac. 481.)

The word "may" is construed to mean "shall." (*Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766.)

The section includes void as well as illegal taxes. (*Graciosa Oil Company v. Santa Barbara*, 155 Cal. 140 at 145, 99 Pac. 483.) (*Otis v. City and County of San Francisco*, 170 Cal. 98, 148 Pac. 933.)

In the case of *Slade v. County of Butte*, 14 Cal. App. 453, 112 Pac. 485, one not the owner of the property was allowed to recover a void tax paid by him.

Otis v. San Francisco, 170 Cal. 98, 148 Pac. 933, is authority for the proposition that if the Board of Supervisors rejects a claim for the refund of taxes, an action may be brought under section 3804. The court goes even further and holds that if the board refuses or neglects to act upon the claim for an unreasonable length of time the claimant may deem his claim denied and bring action. Therefore, the plaintiffs can pay the tax and proceed under section 3804 to recover from the county the amount paid.

III.

Plaintiffs May Recover all the Taxes in One Action Against the County of Los Angeles, Therefore a Multiplicity of Actions Does Not Result.

In the above cases it has been held that a void tax may be recovered by the person paying the same in an action against the county. Nowhere in the bill of complaint is it alleged that the county is not financially able to respond to a judgment or that sufficient funds are not available or will not be available to meet a judgment.

Sec. 3804 provides:

> "* * * When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other public corporation. * * *"

It would seem to require no argument to show that taxes collected on behalf of municipalities may be refunded in one suit against the supervisors, yet the Circuit Court of Appeals in its decision [Tr. p. 91] held that separate actions must be brought against each municipality. This court, in *Union Pacific Railroad Company v. State Board of Commissioners*, 247 U. S. 283, speaking of a similar Colorado statute, said:

> "That the taxes were levied for state, school district and town, as well as for county, purposes is

not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied, and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property for the lien would be effectually removed by paying them and suing to recover back the money. *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Ass'n v. Madden, supra*, 273."

IV.

If the Tax Is Void Plaintiffs May Recover the Entire Tax Paid.

The Circuit Court of Appeals in holding that no provision existed for the recovery of the cost of collection, overlooked the plain language of the section. It specifically provides that "any taxes, penalties or *costs*" may be recovered. The court evidently misunderstood the provisions of Act 8465, Deering's General Laws, 1925, which provides that the municipalities shall pay to the county, a certain per cent of the amount collected not to exceed a certain amount. The court evidently believed that the county officials deduct from every tax collected for the municipality, a fee or charge. Under the provisions of the charter of Los Angeles County, county officials receive no fees, their compensation being entirely composed of their salary. No deduction is made from each individual tax, but for ease in accounting, the amount which the city has agreed to pay the county

for the cost of collection is retained from the gross amount collected.

Section 7 of Act 8465 specifically provides that "the amount of compensation" shall be fixed by written agreement. It is not a fee but merely an item of governmental maintenance the same as any other departmental expense. It is the municipality's portion of the salary of the tax officials. The legislature has not required the taxpayer to pay the cost of collecting a void tax from him but has provided for the refunding of the entire amount paid.

V.

This Court Has Repeatedly Held That Sections Similar to 3804 of the Political Code Furnish a Plain, Adequate and Complete Remedy at Law and Relief by Injunction Is Not Admissible.

We call attention to the case of *Union Pacific Railroad Company v. Board of Commissioners*, 247 U. S. 282, in which this court was speaking of a Colorado statute, which provided:

> "'in all cases,' where any person shall pay any tax, interests or costs * * * that shall thereafter be found to be erroneous or illegal * * * the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

The court said:

> "If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at

law, and therefore that relief by injunction is not admissible is fully sustained by our decisions. *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, and cases there cited; *Pittsburg etc. Ry. Co. v. Board of Public Works*, 172 U. S. 32; *Arkansas Building and Loan Assn. v. Madden*, 175 U. S. 269; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38; *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, 243; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 519."

In each of the following cases, injunctive relief was denied because the taxpayer might bring an action to recover the amount of the alleged illegal taxes.

Shelton v. Platt, 139 U. S. 591;

Arkansas Building Association v. Madden, 175 U. S. 269;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;

City Council of Augusta, Ga., v. Timmerman, 233 Fed. 216 (C. C. A.).

The Circuit Court of Appeals gives as a reason why the remedy was not adequate, the fact that the plaintiffs could not recover interest between the time of payment and the date of judgment. In none of the above cases did the statute authorizing the refund of taxes permit the recovery of interest. The recovery of interest upon judgments against public bodies is a matter of grace and not of right. With but one possible exception, and that a court of the first instance, the courts of the United States have considered that the right to file suit for the recovery of taxes paid constituted an adequate remedy, even though interest was not recoverable.

As pointed out in *Singer Sewing Machine Company v. Benedict*, 229 U. S. 481, even though the Supreme Court of the state of California may hold that because of the failure to allow the recovery of interest the California statutes do not furnish an adequate remedy at law, very different considerations arise where courts of a different sovereignty interpose in the same manner and for the same reasons. The Circuit Court of Appeals by granting injunctive relief on the ground that no interest might be recovered has extended the equity jurisdiction of the United States Courts to a greater length than has ever been recognized by this court.

VI.

The Talking Sets Are Legally Taxable to the American Telephone & Telegraph Company for County and Municipal Taxes.

The question presented is essentially one of statutory construction which admittedly has not been directly passed upon by the courts of California. The pertinent portions of section 14 of article XIII of the California Constitution are set forth in the petition for the Writ of Certiorari. Its meaning depends upon the intent of the people at the time of its adoption. The California scheme of taxes was based upon the idea that the owner of property should pay the tax—upon the maxim "He who receives the benefits ought to bear the burdens." (*People v. McCreery*, 34 Cal. 457.) The idea is fundamentally sound. (*Washburn College v. County of Shawnee*, 8 Kan. 233.)

An assessment of personal property to other than the owner is void. (*Lake Co. v. S. B. Q. M. Co.*, 66 Cal. 21, 4 Pac. 876.)

Every tax has the effect of a judgment against the person and every lien claimed by virtue of the levy has the force and effect of an execution duly levied against all the property of the delinquent. (Political Code, Sec. 3715.) Every tax due on personal property is a lien upon the real property of the owner. (Political Code, Sec. 3717.) If a tax has been duly assessed upon personal property, the owner becomes personally liable for it. (*Kelsey v. Abbott*, 13 Cal. 609, at 617. (*City of Oakland v. Whipple*, 39 Cal. 112, at 115. Sec. 3771 of the Political Code and Statutes of 1921, page 352, authorize suits against the owner.

An examination of the history of the enactment of section 14 shows the substituted method of taxes thereby adopted was not intended in any manner to change the party upon whom the burden of taxation had formerly fallen, but merely to change the payee. (*Report of Commission on Revenue and Taxation*, 1 App. to Journals of Senate and Assembly, 1911, at pages 20 and 38 *et seq.*) The special report of the California State Board of Equalization on the relative burden of state and local taxes in 1912, sets forth the theory of the tax as follows:

> "The theory upon which the rates of the state taxes applied to the gross earnings of the public service corporations were fixed was that these rates would be substantially equivalent to the rates of taxation paid by other property owners—that is,

> they should be the equivalent of the average throughout the state, and not, necessarily, the equivalent of the burden borne in any one locality."

The result of the Circuit Court of Appeals' interpretation is to exempt from local taxation all property privately owned but rented to public utilities. It was not the intent of the people to permit the owners of a valuable office building in the heart of a business district to be free from taxes merely because his lessee was a public utility. Section 14 provides that the gross revenue tax is "upon *their* franchises * * * and other property" and that such taxes shall be in lieu of all other taxes "upon the property above enumerated *of such companies.*"

The Constitution derives its force and authority from the vote of the people adopting it. For that reason the words used therein shall be given the meaning which they bear in ordinary use among people. The words "property of" and "their property" imply ownership, not possession or use. (*State Land Settlement Board v. Henderson et al.*, 70 C. D. 647.)

If the ordinary meaning be given the words "their" and "of such companies" the tax paid to the state does not include a tax upon property belonging to others and it is not relieved from local taxation. It was not the intent of the people to relieve the owner who receives a large income from his property, from contributing his portion of the cost of the protection arising out of organized government. As section 1 of article XIII provides that all property in the state with the exception of that falling under the provisions of section 14, and cer-

tain other sections not pertinent to these issues, shall be taxed in proportion to its value, it follows that the "talking sets" are subject to local taxes.

Conclusion.

It is urged upon the foregoing considerations and authorities, that a Writ of Certiorari should issue to the Circuit Court of the Ninth Circuit for a review of said judgment reversing the decision of the District Court of the United States for the Southern District of California, Southern Division.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 133.

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; F. M. Ross, Deputy Assessor of the County of Los Angeles, State of California; W. O. Welch, Tax Collector of the County of Los Angeles, State of California; H. A. Payne, Auditor of the County of Los Angeles, State of California, and County of Los Angeles, a body corporate and politic.

Petitioners,

vs.

Southern California Telephone Company (a corporation), and The Pacific Telephone Company (a corporation),

Respondents.

BRIEF FOR PETITIONERS AFTER GRANTING OF WRIT OF CERTIORARI.

This case comes on for hearing on the merits before this court after order of this court on November 29, 1926, granting petition for writ of *certiorari* directed to

the United States Circuit Court of Appeals for the Ninth Circuit (..... U. S. .....; 71 L. Ed. (Adv. Op.) 285) reviewing decision of that court, pursuant to its opinion found at page 76 of the transcript of record reversing the judgment of the District Court of the Southern District of California.

The said judgment of the Circuit Court of Appeals which it is here sought to be reversed is dated June 7th, 1926. [R. 95.] Petitioner's petition for rehearing thereof was denied on July 12, 1926. [R. 96.] The statutory provision giving this court jurisdiction in the premises is to be found in title 28, section 347, subdivision a, of the United States Code (Judicial Code, sec. 240, subd. a, as amended).

Statement of the Case.

The respondents brought this action against the petitioners in the District Court of the United States for the Southern District of California, Southern Division, to enjoin the seizure and sale of approximately three hundred thousand telephone "talking sets" in satisfaction of a local tax.

The respondents Southern California Telephone Company and Pacific Telephone and Telegraph Company, California corporations, at all times herein mentioned operated a telephone business within the state of California, including the County of Los Angeles. As an essential part of their business in the County of Los Angeles they operated over 300,000 telephone instruments, each consisting of (1) a receiver, transmitter and induction coil which respondents have designated collectively a telephone "talking set" and upon which the tax in ques-

tion was levied, (2) a stand in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. These telephone "talking sets" were not owned by the above named companies, but were owned by the American Telephone and Telegraph Company, a New York corporation not operating within the state of California, and were leased by it to the operating companies. [R. 7.]

In April, 1925, petitioner county assessor assessed against the American Telephone and Telegraph Company a personal property tax of $52,224.45 on these "talking sets." [R. 7-11.] The tax was not paid as the operating companies claimed that it was precluded by the gross receipts tax they had paid in accordance with article XIII, section 14, of the Constitution of the state of California, which lays a tax upon the properties of certain enumerated public utility corporations in lieu of local taxes. [R. 13.] The county officials contended that the provisions of this law applied only to property owned by such corporations and did not include property owned by others, though used in such public utility business.

At the time that this action arose there had been no determination of this question by the Supreme Court of California. On July 2, 1927, however, the California Supreme Court did pass upon this question in two other cases, holding that the state gross receipts tax levied on telephone companies (among other similar corporations) was in lieu only of all other taxes on property *owned* by them, and that other property, even though it might be used by such public utility companies in their operations, remains subject to the exercise of the local taxing power. It is true that, upon petition of the telephone companies,

a rehearing was granted by the Supreme Court, whereupon these cases were dismissed upon motion of said companies on the ground that the question had become moot; but the fact remains that these decisions furnish the only expression of the California Supreme Court available on this subject. These decisions are discussed in our argument under point V of this brief and are printed in full in appendices I and II hereto.

In the case here presented the operating companies filed a bill in the United States District Court for a permanent injunction and obtained a temporary restraining order preventing the county officials from collecting the tax by levy and seizure. Petitioners moved to dismiss the bill on the grounds (1) that the tax was legally due; (2) that the bill stated no facts entitling respondents to equitable relief, as a plain, speedy and adequate remedy at law existed under the laws of California by payment of the tax and suit for refund; and (3) that the bill stated no facts showing jurisdiction in the United States Court. [R. 31-32.]

Petitioners also filed an answer to the bill of complaint [R. 24] by which they denied that "the taxes paid by plaintiffs or either of them for State purposes covered the 'talking sets,' or any of them," and denied "that any taxes have been paid upon said 'talking sets' for the year 1925 as required by law, or at all." [R. 26.]

After due hearing and argument, the District Court rendered its decree dismissing the bill. [R. 53-54.] The telephone companies then appealed to the Circuit Court of Appeals. The Circuit Court of Appeals reversed the decree of the District Court and directed the lower court to enter a permanent injunction against the collection of

the tax. [R. 94-95.] In its opinion, the Circuit Court of Appeals decided directly, or by necessary implication, (1) that article XIII, section 14, in providing a tax on gross receipts of plaintiffs, had provided a tax on the "talking sets" and the tax complained of by plaintiffs was illegal under the state law; (2) that the remedies in this case under the laws of the state of California for action for refund of taxes illegally collected do not constitute an adequate remedy at law and hence respondents were entitled to equitable relief by injunction; and (3) that the District Court had jurisdiction.

Errors Specified.

The errors which are urged by us as grounds for reversal of the judgment of the Circuit Court of Appeals are as follows:

1. That the Circuit Court of Appeals erred in holding and deciding that the United States District Court had jurisdiciton of the cause. [R. 85.]

2. That the Circuit Court of Appeals erred in holding and deciding that the payment of the taxes and a suit for their refund did not furnish respondents an adequate remedy to contest the validity of the taxes and that respondents were entitled to equitable relief by injunction to prevent the collection of the tax. [R. 88.]

3. That the Circuit Court of Appeals erred in holding and deciding that the tax in question was not authorized by the California law. [R. 78.]

Introductory Statement.

The issues of law presented in this case arise out of a construction of article XIII, section 14, of the California Constitution adopted in 1910, which provides for a gross

receipts tax upon certain public utilities, including telephone companies. The purpose of the amendment was to provide a method of taxation which would fall with the same burden upon the properties of public utilities, as that levied upon private property in the state of California. (See point V hereof.) It was only incidental to this change of method of taxation that the gross receipts taxes were to be paid to the state, in lieu of all local taxes, while private property was exempt thereafter from the burden of state taxation.

Article XIII, section 14, of the California Constitution reads as follows:

> "Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping-car, dining-car, drawing-room car and palace-car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.
>
> "(a) All railroad companies, including street railways, whether operated in one or more counties; all sleeping-car, dining-car, drawing-room car, and pal-

ace-car companies, all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel or stage line, in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon *their* franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, *and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows:* Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state." (Our italics.)

In furtherance of this constitutional provision, the California legislature has defined "operative property" (property upon which the gross receipts tax is paid) for telephone and telegraph companies in section 3665b of the California Political Code, which reads, insofar as it is pertinent here, as follows:

"The term 'operative property' as used in any section of this code shall include:

"(d) In the case of telegraph and telephone companies doing business in this state: The franchises, rights of way, poles, wires, pipes, conduits, cables,

switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings."

Public utilities, as other corporations, rent, lease or hire many facilities which they might but do not own. These properties range from skyscrapers used as public utility office buildings to batteries of adding machines and fleets of automobiles. For fourteen years your petitioners have assessed and collected taxes from private persons owning real estate leased to these respondents and other public utilities for purposes which, if owned by utilities, would without question render them operative under article XIII, section 14, without any objection being raised as to the validity of the taxes. It was not until your petitioner discovered that the "talking sets" used by respondents were not *owned* by them and levied the tax in question here, that the respondents for the first time contended that "ownership plus user" as previously made the test of "operative property" by your petitioners was wrong, and that the correct test was that of "user" only.

The substantive question of law, therefore, raised in the instant case far exceeds in importance that which appears from the record. Property assessed for taxation purposes at millions of dollars and now paying several hundred thousand dollars annually into the treasury of Los Angeles County, and, in addition, similar properties in the 57 other counties of California, are involved here.

The case is, therefore, of paramount importance to the fiscal system of petitioner county.

But we believe that more important even than this substantive question is the question of Federal jurisdiction squarely presented to this court. Respondents claim the allegation, made in good faith by them in their bill of complaint, that the tax in question violates their rights under the Federal Constitution, *regardless of whether that claim is sound or not*, removes to the federal courts, and in time to this court, the determination on its merits as to whether the tax was validly levied under the California statutes and Constitution.

On the other hand, our fundamental contention herein is that unless the determination of the question of state law is inextricably bound up with the federal question, and it is necessary to determine it first to decide whether rights of the petitioners, under the federal Constitution, have been infringed, this court does not and should not decide a question of state law.

When, as here (see point I hereof), no allegations of a substantial question of a violation of respondents' rights under the Federal Constitution are contained in the bill of complaint and, even assuming that such allegations are contained in the bill, no facts are shown, or are admitted, out of which such a substantial question can arise, there is no necessity for this court to pass upon a question of intricate state law, since in any event the decision even of this tribunal must bow in such matters to the final determination by the state court. If our position is not correct in this regard, it will mean that every tax levied by your petitioner county, provided the taxpayer allege in good faith that his rights under the Federal Con-

stitution have been violated—and good faith is an expansive quality—may be enjoined by the Federal courts and its validity *under state law* taken to this highest court, before the tax can be collected. Such a situation would be most disastrous for the fiscal systems of the governmental agencies of our 48 states. Nor do we believe such a result is consonant with the past decisions of this court or of the underlying principles of the Federal Constitution and the federal system established thereby.

Furthermore, the danger of such a course is shown in this very case, where the decision of the Circuit Court of Appeals complained of herein was later commented upon, criticised and an opposite ruling adopted by the Supreme Court of California upon the precise point of law involved. (See point V hereof.)

Summary of Argument.

Earlier in this proceeding, in support of our petition for issuance of writ of *certiorari* by this court directed to the Circuit Court of Appeals for the Ninth Circuit, we filed a comparatively short brief setting forth our contentions. Although the argument presented herein is largely an amplification of the contentions made at that time, we desire again to call it to the attention of this court. We have also considered the arguments advanced by respondents, in opposition to the issuance of a writ of *certiorari*. In order to present our arguments in consecutive order, we have not placed rebuttal arguments under special headings except where the matter was of a separate nature. We believe, however, that reference to this

summary or the table of cases will readily disclose where in this brief the arguments of respondents are considered.

Our argument herein may, therefore, be summarized as follows:

I. The Circuit Court of Appeals erred in holding that a federal question, and therefore federal jurisdiction, was shown by the allegations of the bill of complaint.

A. Unless the bill of complaint alleges a substantial ground for the invalidity of the tax complained of under the provisions of the fourteenth amendment, no federal jurisdiction is shown. Invalidity under state law cannot furnish such federal question or jurisdiction.

1. Allegations of a federal question abstractly sufficient, if formal, frivolous, or foreclosed by prior decisions of this court, will not show federal jurisdiction.

2. A substantial federal question is alleged only when it appears that some right of plaintiff upon which his recovery depends will be defeated by one construction of the Federal Constitution or statute and will be sustained upon the opposite.

3. Inasmuch as the fourteenth amendment does not make questions of state law a constitutional right, allegations contained in the bill of complaint as to the validity of the tax under the state Constitution are immaterial insofar as a federal question and jurisdiction are concerned if the tax itself complies with the universal test of the fourteenth amendment.

B. The bill of complaint fails to allege a substantial ground of validity under the fourteenth amendment since a double tax on the "talking sets" and consequent discrimination against property leased to public utilities, does not constitute a violation of

either the "due process of law" or "equal protection of the laws" provisions of the amendment.

1. Double taxation does not of itself constitute a violation of the fourteenth amendment.
2. A system of taxation discriminating between property leased to an operative utility and that owned and operated by the public utility is not so arbitrary as to be in violation of the fourteenth amendment.
3. Respondents must prove their case upon the facts as alleged in the record and this court will not determine a question of constitutional law upon hypothetical or imaginary cases.

C. The bill of complaint fails to allege a substantial ground of invalidity under the fourteenth amendment since the tax in question, levied by subordinate agencies for local purposes and not by state officers, and, on the theory of the bill, in plain conflict with the California statutes and Constitution could not constitute an "act" of the state within the meaning of the amendment until passed upon by the state courts.

II. Assuming, without admitting, that federal jurisdiction is shown by the allegations of the bill of complaint, the Circuit Court of Appeals erred in holding that it set forth grounds for equitable relief.

A. A violation of a constitutional right is not a ground for the exercise of equity jurisdiction unless the plaintiff has no adequate remedy at law.

B. Respondents have an adequate remedy at law in their action for refund of taxes under the provisions of the California Political Code.

1. Respondents can recover erroneous or void taxes after they are paid by recourse to sections 3804 and 3819 of the California Political Code.

a. The power to refund invalid taxes lodged in the county board of supervisors is mandatory, not discretionary.

b. Political Code sections 3804 and 3819 provide concurrent remedies.

c. Respondents, as lessees of the "talking sets" or the American Telephone and Telegraph Company, as owner, could pay the tax and recover the sum paid, if the tax were held invalid.

d. Respondents could recover the entire tax paid including the cost of collection of such portion as was municipal in their subsequent action at law.

e. This court has held that statutes almost identical with section 3804 afforded an adequate remedy at law.

2. Inasmuch as under the California decisions, the respondents can recover the tax complained of if invalid, under the Political Code sections cited above, no uncertainty of legal remedy is shown.

C. Respondents can recover the entire tax complained of here if void or invalid in a single action against petitioner county. No multiplicity of suits at law will therefore result.

D. That respondents cannot recover interest on taxes paid from the date of payment to the date of entry of judgment does not result in inadequacy of legal remedy.

E. The bill of complaint fails to show grounds for equitable relief since the plaintiff is neither the owner nor person primarily responsible for the tax complained of.

III. Inasmuch as the "talking sets" were not in fact taxed through the gross receipts of respondents no violation of the fourteenth amendment is shown.

A. The history and subsequent legislative and judicial interpretation of the gross receipts tax in California shows it to be a substituted tax upon property owned by the public utilities and does not include property leased to them.

B. Inasmuch as the gross receipts of respondents are largely the result of arbitrary service rates so fixed by the California Railroad Commission as to allow a fair return upon the property owned by respondents, excluding all leased property, the "talking sets" leased to respondents could not be taxed by the gross receipts tax levied upon respondents.

1. The gross receipts of respondents taxed under the provisions of article XIII, section 14, of the California Constitution, are almost entirely the result of arbitrary service rates established by the California Railroad Commission to give a fair return upon their investment or rate base.

2. The rate base of respondents, as established by the California Railroad Commission, includes only property owned by respondents and does not include the "talking sets."

3. Inasmuch as the "talking sets" were not included in the rate base of respondents and therefore would not affect their gross receipts or gross receipts tax, no double taxation or discrimination arises when the "talking sets" were taxed under the general provisions of the California law to the owner thereof.

IV. Assuming, without admitting, that federal and equitable jurisdiction is shown by the allegations of the bill of complaint, inasmuch as double taxation and discrimination were not in fact shown, the Circuit Court of Appeals erred in passing upon a question of the interpretation of a state constitution.

A. The decision of the Circuit Court of Appeals was in violation of the rule that federal courts will not declare an administrative act to be violative of the provisions of a state constitution unless such a holding is imperatively necessary.

B. The decision of the Circuit Court of Appeals was in violation of the rule that federal courts will not interfere with matters affecting state revenue unless such interference is imperatively necessary.

V. Assuming, without admitting, that federal and equitable jurisdiction is shown by the allegations of the bill of complaint, the Circuit Court of Appeals erred in holding, as a matter of state law, that "operative property" taxed by virtue of article XIII, section 14, of the California Constitution through the gross receipts of respondents, included the "talking sets" leased to respondents.

A. The history of article XIII, section 14, shows it to be a substituted property tax upon respondents and was not intended to exempt from taxation property which had not been previously taxed to public utilities.

1. The ordinary scheme of taxation in California is that property is taxed to the owner thereof.

2. The framers of the constitutional amendment in providing for a gross receipts tax intended simply to levy the same tax on property owned by public utilities, and previously taxed to

them, as was levied on all other property in the state. There was no intention to exempt any property from taxation or to remove from local taxation any property except that owned by public utilities.

B. The language of article XIII, section 14, requires a construction of the property taxed thereunder which is limited to property *owned* by public utilities.

1. The use of the words "property" and "their" in article XIII, section 14, requires ownership, not merely use.

2. Subsequent construction of article XIII, section 14, by the State legislature and Railroad Commission has limited the property taxed by gross receipts tax to property owned by public utilities.

C. The exact question presented here has been passed upon by the California Supreme Court adversely to the decision of the Circuit Court of Appeals.

1. The decisions of the California Supreme Court have long inferentially held that "operative property" was limited to that owned by public utilities.

2. By its decisions in the *Pacific Telephone and Telegraph Company v. State Board of Equalization*, 74 California Decisions 96, and *Southern California Telephone Company v. State Board of Equalization*, 74 California Decisions 102, the California Supreme Court has expressly held that property leased to public utilities is not taxed through the gross receipts tax.

3. The decision of the Circuit Court of Appeals in this case was referred to by the California Supreme Court and is criticised in the above cases.

D. It is the duty of this court, in questions of state law, to follow decisions of state courts arising

after the Federal litigation originated, if jurisdiction still remains in the Federal court to render judgment.

E. Authorities from other states relied on by the Circuit Court of Appeals are not applicable to the situation here inasmuch as the cases arise under totally different statutory provisions.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A FEDERAL QUESTION, AND THEREFORE FEDERAL JURISDICTION, WAS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT.

If the bill of complaint in the instant case alleges facts showing jurisdiction in the District Court, since no diversity of citizenship existed or was alleged, it must be under title 28, section 41, subdivision 1, of the United States Code (Judicial Code, sec. 24, subd. 1, as amended) as an action at equity "where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and (a) arises under the Constitution * * * of the United States."

Although by paragraph XIV of the bill of complaint it is alleged that the tax complained of "would deprive each plaintiff of its property without due process of law, and deny to each plaintiff the equal protection of the laws, and is and would be in violation of the rights, privileges and immunities of each plaintiff under the Constitution of the United States, and particularly under subsection 3 of section 8 of article I thereof, and of the Fourteenth Amendment thereto" [R. 15], counsel for re-

spondents have expressly waived any question of invalidity of the tax under the commerce clause of the Federal Constitution. (Footnote, p. 11, Brief for Appellants before Circuit Court of Appeals.) They have therefore rested their case before that court and here solely upon the alleged violations of the fourteenth amendment.

It is our contention that the bill of complaint fails to allege facts sufficient to show jurisdiction in the District Court and that the Circuit Court of Appeals erred in holding that it did. [R. 85-88.] Petitioners have at all times challenged the jurisdiction of the federal courts over this case. [See Notice of Motion to Dismiss, R. 30; Return of Defendants to Restraining Order, R. 39; Decision on Motion to Dismiss Bill of Complaint, R. 50; Appellees' Brief before Circuit Court of Appeals, pp. 7-36.] Inasmuch as this was not a proceeding in accordance with title 28, section 380 of the United States Code (Judicial Code, sec. 266), all matters are properly before this court by writ of *certiorari* to the Circuit Court of Appeals of the Ninth Circuit reviewing the decision thereof complained of by petitioners.

Matter of Buder, 271 U. S. 461, 464.

A. Unless the Bill of Complaint Alleges a Substantial Ground for the Invalidity of the Tax Complained of Under the Provisions of the Fourteenth Amendment, No Federal Jurisdiction Is Shown. Invalidity Under State Law Can Not Furnish Such Federal Question or Jurisdiction.

This court has long held that "not every mere allegation of a Federal question will suffice to give jurisdiction."

Corrigan v. Buckley, 271 U. S. 323, 329;
Zucht v. King, 260 U. S. 174, 176;
Sugarman v. United States, 249 U. S. 182, 184;
United Surety Co. v. American Fruit Co., 238 U. S. 140, 142;
Brolan v. United States, 236 U. S. 216, 218;
Hendricks v. United States, 223 U. S. 178, 184;
Goodrich v. Ferris, 214 U. S. 71, 79;
Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311;
New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 345.

It is our contention that the allegations of the invalidity of the tax on the "talking sets" under the provisions of the fourteenth amendment do not of themselves vest any jurisdiction in the federal court. Unless the allegations of the bill of complaint made out a *prima facie* case against the tax on federal grounds, it is our belief that the bill fails to state a cause of action in the federal court, *irrespective of the validity of the tax under state law.*

1. Allegations of a Federal Question Abstractly Sufficient, if Formal, Frivolous, or Foreclosed by Prior Decisions of This Court, Will Not Show Federal Jurisdiction.

It is the duty of the federal court, if it appears that the allegations of the complaint as to unconstitutionality are immaterial to the real question presented therein, and inserted solely to give the court jurisdiction, to dismiss the case on that ground.

Corrigan v. Buckley, 271 U. S. 323, 329;

United Surety Co. v. American Fruit Co., 238 U. S. 140, 142;

Goodrich v. Ferris, 214 U. S. 71, 79;

Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 291.

Likewise, in all cases where there is no "color of foundation" for the allegation of unconstitutionality.

Delmar Jockey Club v. Missouri, 210 U. S. 324, 335;

New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 345;

Wilson v. North Carolina, 169 U. S. 586, 595;

New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 87.

Furthermore, "although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appears that such question is wholly formal, is so devoid of merit as to be frivolous, or has been so foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

Corrigan v. Buckley, 271 U. S. 323, 329;

Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311;

Devine v. City of Los Angeles, 202 U. S. 313, 335.

It is immaterial, then, whether the allegations contained in the bill of complaint in the instant case state what theoretically might seem to be a violation of the fourteenth amendment. The allegations, when taken together with the facts of this case as set forth in the bill of complaint, must set up a "substantial question" arising under

the Federal Constitution, by virtue of an alleged violation of the fourteenth amendment, or this court must remand the case to the District Court with directions to dismiss for lack of jurisdiction.

Corrigan v. Buckley, 271 U. S. 323, 331;
Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232;
Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436, 441;
Matters v. Ryan, 249 U. S. 375, 377;
Norton v. Whiteside, 239 U. S. 144, 147;
Hull v. Burr, 234 U. S. 712, 720;
McGilvra v. Ross, 215 U. S. 70, 79;
Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576.

Counsel (Respondents' Brief, p. 9) have contested our position in this regard by citing the decision of this court in *Moore v. New York Cotton Exchange*, 270 U. S. 593, 608, in which the court quoted from its earlier decision in *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291, 305. It is noteworthy that in neither case did this court question the rule stated above, but simply clarified the situation as to which party had the burden of showing the insufficiency of the allegations, holding that this task rested upon the defendant. This burden we readily assume.

It must be understood that we do not contend, nor is it necessary to our contention in this regard, that the jurisdiction of a federal court depends in any way upon the final determination on the merits of the federal question

involved. Jurisdiction, of course, can never rest upon the merits of the case.

Binderup v. Pathe Exchange Inc., 263 U. S. 291, 305.

Furthermore, in *Corrigan v. Buckley*, 271 U. S. 323, 329, the *Moore Case* was cited and relied on by this court in dismissing an appeal for lack of jurisdiction because the allegations of the bill as to the alleged unconstitutionality were lacking in "substantial quality or color of merit."

We respectfully submit, therefore, that if the allegations as to unconstitutionality of the tax, complained of here, contained in the bill of complaint, when applied to the facts of the case as alleged in the bill, do not and cannot make out a *prima facie* case of invalidity under the fourteenth amendment, then this court has no jurisdiction of the case except to remand to the District Court with instructions to dismiss for lack of jurisdiction. That such is in fact the case, we purpose to show below.

2. A Substantial Federal Question Is Alleged Only When It Appears That Some Right of Plaintiff Upon Which His Recovery Depends Will Be Defeated by One Construction of the Federal Constitution or Statute and Will Be Sustained Upon the Opposite.

What, then, constitutes a question arising under the statutes or Constitution of the United States? This court in the leading case of *Starin v. New York*, 115 U. S. 248, in affirming an order of a circuit court remanding a case to the state court for lack of jurisdiction, long ago stated the rule at pages 257-8, as follows:

"The character of a case is determined by the questions involved. *Osborn v. Bank of United States,* 9 Wheat. 738, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not. Such is the effect of the decisions on this subject. (Citing cases.)

"The questions in this case, as shown by the pleadings, are, 1, whether the city of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill von Kull; and, if it has, then, 2, whether the defendants have, in law and in fact, interfered with that right by setting up and operating such a ferry. The determination of these questions depends, 1, on the construction of the grant in the charter of the city; and, 2, on the character of the business in which the defendants are engaged. • • • The decision of these questions does not depend on the Constitution or laws of the United States. There is nothing in the Constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants, or in another sustain them."

See, also:

Wagner Electric Manufacturing Co. v. Lyndon, 262 U. S. 226, 232;

Matters v. Ryan, 249 U. S. 375, 377;

Devine v. City of Los Angeles, 202 U. S. 313, 335;

Bankers Casualty Co. v. Minn., St. P., etc., Ry., 192 U. S. 371, 385;

City of New Orleans v. Benjamin, 153 U. S. 411, 430.

3. Inasmuch as the Fourteenth Amendment Does Not Make Questions of State Law a Constitutional Right, Allegations Contained in the Bill of Complaint as to the Validity of the Tax Under the State Constitution Are Immaterial Insofar as a Federal Question and Jurisdiction Are Concerned, If the Tax Itself Complies With the Universal Test of the Fourteenth Amendment.

That the fourteenth amendment does not in any way take into the Federal Constitution provisions of state laws or constitutions has long been held by this court. Thus in *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, this court said at page 166:

> "The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Again, in *Hebert v. Louisiana*, 272 U. S. 312, pages 316-317, 71 L. Ed. (Adv. Op.) 111, Mr. Justice Van Devanter, speaking for this court, said at page 113:

> "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of

the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' *Those principles are applicable alike in all the states, and do not depend upon or vary with local legislation.*" (Our italics.)

See, also:

American Railway Express Co. v. Kentucky, 71 L. Ed. (Adv. Op.) 456, 458 [47 Sup. Ct. Rep. 353]; 273 U.S. 269 272 3

Pullman Company v. Knott, 235 U. S. 23, 25;

Burt v. Smith, 203 U. S. 129, 135;

Rawlins v. Georgia, 201 U. S. 638, 640;

French v. Taylor, 199 U. S. 274, 278;

Castillo v. McConnico, 168 U. S. 674, 683-4;

Central Land Co. v. Laidley, 159 U. S. 103, 112;

Sayward v. Denny, 158 U. S. 180, 186.

The allegations of the bill of complaint, as summarized by the respondents (Respondents' Brief pp. 4-7), set forth generally a cause of action for the restraint of the collection of a state tax because of invalidity under the provisions of article XIII, section 14, of the California Constitution, by the terms of which respondents pay a tax upon their gross receipts which it is alleged "were in lieu of all other taxes and licenses, state and municipal, upon the operative property of plaintiffs," which property, it is further alleged, included the "talking sets" in question. *No direct allegation of facts constituting a violation per se of the fourteenth amendment are contained in the bill of complaint.* Federal jurisdiction is

stated, if at all, in the general allegations of constitutional violation contained in paragraph XIV [R. 15] (quoted in our introductory statement herein), and in paragraph XV alleging that sections 3820, 3821, 3822, 3790, 3791, 3792 and 3793 of the Political Code of the state of California are "unconstitutional and void" "insofar as the same, or any of them, purport to authorize said threatened seizure and sale." Reference to these code sections discloses that they are simply the general sections for collection of personal property taxes by seizure and sale upon refusal of the owner thereof to pay. The gist, therefore, of the entire bill of complaint is the construction of article XIII, section 14, of the California Constitution.

Although the complaint itself does not specify the exact grounds of unconstitutionality relied upon by respondents, they have set them out (Respondents' Brief, pp. 16-18) substantially as follows:

1. That the tax results in an arbitrary and unreasonable discrimination in violation of the due process clause since property leased to public utilities will bear twice the burden imposed on property owned by them.

2. That double taxation in the face of Political Code section 3607 and article XIII, section 1 requiring all property in the state, with limited exceptions, to be taxed in proportion to its value is invalid under the equal protection clause.

3. That article XIII, section 14, provides that the gross receipts tax shall be in lieu of any tax on the property in question, no matter by whom owned, and the tax constitutes a violation of the equal protection clause and the seizure and sale, a taking without due process.

It appears, therefore, that the argument of respondents, as to the second and third contentions, does not rest upon any right given them under the fourteenth amendment to the Constitution but arises out of a construction of article XIII, section 14, of the California Constitution, inasmuch as any legislative enactment contained in section 3607 of the Political Code, if the section is applicable here, would be controlled by the constitutional provisions. From the authority cited above, it is evident that the state law or Constitution cannot add to or detract from the standard imposed by virtue of the due process clause of the fourteenth amendment; and the validity of the tax as attacked in the second and third contentions does not become a federal question under that head. Therefore, insofar as the "due process" clause is concerned, it is evident that the bill of complaint fails to state a federal question or federal jurisdiction by virtue of the second and third contentions of respondents.

As to the "equal protection of the laws" clause, we admit that the situation is somewhat different. A state may by its constitution or laws, give to its citizens rights in addition to the minimum set by the "law of the land" test of the fourteenth amendment. In that case, by virtue of the "equal protection of the laws" provisions, the fourteenth amendment guarantees to all citizens in the same situation such additional rights as the state has given. However, the fact of such an extension is always a question of state law and this court is absolutely bound by the determination of the state courts on such a matter.

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 239.

As set forth below (see point I, C. 1 hereof), the fourteenth amendment does not protect individuals from acts of unauthorized persons, but is limited to cases where the state has "acted" contrary to its provisions. Because of this necessity to show in the instant case a state "act" in order to furnish this court with jurisdiction, we submit that, *in the absence of state decisions upon the question, it must be assumed, for the purpose of determining whether the Federal court has jurisdiction over acts of subordinate agencies acting for local and not for state purposes and proceeding solely by virtue of state constitutional provisions, that the acts are authorized by the state constitution.* Otherwise the act in question would be that of an individual not included within the purview of the fourteenth amendment.

Of course, if the state has acted through its own executive or administrative agencies, such a presumption is not indulged in as it would not be required to give the federal court jurisdiction. (See point I, C hereof.) Further, if the subordinate agency is acting under authority ostensibly given by a state enactment contrary to the provisions of the State Constitution, then the state has "acted" and a federal question may be presented solely arising out of the invalidity of the state statute under its own constitution by virtue of the "equal protection of the laws" clause.

Johnson v. Wells Fargo & Co., 239 U. S. 234, 238.

This is not the case presented by the instant facts, however, for the tax in question was not levied by virtue of any special statute, but by virtue of the terms of the California Constitution itself. Unless it be assumed for the purpose of determining jurisdiction that the tax is

authorized by article XIII, section 14, then the lack of jurisdiction plainly appears as set forth below. (See point I, C hereof.)

Respondents (Respondents' Brief p. 9) have argued that our contention is that the Federal courts below "should have defeated their jurisdiction by assuming that the plaintiffs had no meritorious case." We do not so argue. We simply maintain that the question of invalidity of the instant tax by virtue of the provisions of the State Constitution is foreclosed here, inasmuch as otherwise no state "act" is alleged by the bill of complaint. In other words, we maintain that unless the petitioners are shown to have acted by virtue of the State Constitution, since at no time were they state officers or acting on behalf of the state, no federal jurisdiction can possibly be shown.

Nor are the cases cited by respondents (*Cuyahoga River Power Co. v. Akron*, 240 U. S. 462, 463-4; *Old Colony Trust Co. v. City of Seattle*, 271 U. S. 426, 427) opposed to our contention. The former was concerned with the appropriation of certain river waters under a city ordinance which was alleged invalid under the state law and constitution. This was deemed a state "act" on the authority of *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, and *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20. (For discussion of these cases in connection with the present case, see point I, C *infra*.) Mr. Justice Holmes, speaking for the court at pages 463-4, expressly rested the jurisdiction of the court upon the allegation that the city intended to take the property in question without the payment of compensation therefor. In other words, a

state "act" was alleged which was unconstitutional not because of invalidity under the state constitution or statute, but because it was contrary to the test of "the law of the land." The second case is solely concerned with the question as to whether the District Court was correct in holding a bill to enjoin the collection of an admittedly valid tax in such a manner as to discriminate against the plaintiffs was tantamount to a suit against the state in the federal district court contrary to the provisions of the eleventh amendment to the Federal Constitution. No question of a violation of state law was raised or considered in the case.

Indeed, the rule for which we are contending was most aptly stated by this court in *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, upon which respondents rely so heavily, at page 288, as follows:

> "To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be tested by *assuming that the officer possessed power* if the act be one which there would not be opportunity to perform but for the possession of some state authority." (Our italics.)

The only constitutional questions raised, therefore, by the bill of complaint, which could possibly show grounds for federal jurisdiction of the case, are those arising out of the fourteenth amendment itself and contained in their first contention. In other words, was there a violation of the test of the "law of the land" imposed by the "due process" and "equal protection of the laws" provisions by

levying a tax on property leased to public utilities twice as great as that levied upon property owned by them? If such an allegation states a federal question, jurisdiction over this case by the District Court was presented by the allegations of the bill; otherwise not.

This, we submit, is in keeping with former decisions of this court. In *St. Joseph and Grand Island Railroad Co. v. Steele*, 167 U. S. 659, this court had presented to it a case very similar to that presented here. It arose upon a bill of complaint for injunctive relief brought by the railroad to restrain the collection of a Kansas tax upon a certain railroad bridge levied upon by local authorities on the ground that the bridge constituted a component part of its railroad and as such was only taxable by the State Board of Railroad Assessors. The bill did not, as here, allege a conflict with the fourteenth amendment, but it did allege that inasmuch as the bridge was built by virtue of a federal grant, that a federal question was presented. The court held that the question as to who should tax the bridge was one of state law and that inasmuch as no sufficient federal ground was alleged by virtue of the federal grant, it reversed the decree of the Circuit Court of Appeals and remanded the case to the District Court with instructions to dismiss for want of jurisdiction. The decision was later expressly relied upon by this court in *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 130.

See, also, for cases in which this court has denied federal jurisdiction where no substantial federal question was presented by the allegations of the pleadings:

Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232;

Matters v. Ryan, 249 U. S. 375, 377.

Unless, therefore, a substantial question arising out of an alleged violation of the fourteenth amendment itself, as distinguished from invalidity of the tax because of provisions of the State Constitution, we submit that in the instant case the bill of complaint fails to state a federal question and jurisdiction in the federal District Court.

B. The Bill of Complaint Fails to Allege a Substantial Ground of Invalidity Under the Fourteenth Amendment Since a Double Tax on the "Talking Sets," and Consequent Discrimination Against Property Leased to Public Utilities, Does Not Constitute a Violation of Either the "Due Process of Law" or "Equal Protection of the Laws" Provisions of the Amendment.

We have shown above that the bill of complaint fails to show any jurisdiction in the federal court unless it alleges facts which, if authorized by the State Constitution would make article XIII, section 14, invalid under the fourteenth amendment. The first of respondents' contentions and, as we have shown above, the only one which rests squarely upon a violation of the fourteenth amendment, is actually composed of two arguments. First, that double taxation is invalid; secondly, that an unconstitutional discrimination exists in the present case by virtue of the alleged double tax on the "talking sets," when other property owned by public utilities pays but one tax. When analyzed, we submit that neither of these allegations presents a *prima facie* federal question.

1. Double Taxation Does Not of Itself Constitute a Violation of the Fourteenth Amendment.

This court has held so repeatedly and over such a long period of years that double taxation does not necessarily render a tax invalid, that little citation of authority is required. However, as recently as January of this year, in *Swiss Oil Corporation v. Shanks*, 47 Sup. Ct. Rep. 393, this court passed upon practically the exact question in this regard raised by respondents herein. In that case the court had before it the constitutionality of the act of March 29, 1918, chapter 122, acts 1918, page 540, of the Kentucky Laws, requiring those "producing crude petroleum oil" in the state to pay "in lieu of all other taxes on the wells producing such crude petroleum" an annual tax of "one percentum of the market value of all crude petroleum so taxed." Subsequent to the enactment of this act, the Kentucky Court of Appeal held this act to be a license tax, and not a substituted property tax, and therefore valid under the provisions of the Kentucky Constitution which, as previously construed by the Kentucky court, prohibited such a substituted property tax. In a writ of error issued from this court to the Kentucky Court of Appeals, it was contended that the Kentucky decision was in contravention of the fourteenth amendment, in that the 1918 act was in fact a substituted property tax, and therefore constituted a violation of the Federal constitutional provision. This court, at page 395, stated its doubts as to the correctness of the rulings of the Kentucky court, but held itself bound by that determination. It further dismissed the contention that it was, in fact, a substituted property tax, on page 395, as follows:

"But even if regarded as a property tax, it is imposed alike upon all crude oil produced within the state and there is nothing in the record to suggest that the classification is so palpably arbitrary or unreasonable as to render it invalid. (Citing cases.) Unlike the state Constitution the Fourteenth Amendment does not require uniformity of taxation (*Davidson v. New Orleans*, 96 U. S. 97, 105), nor forbid double taxation."

The correct rule has been aptly stated by this court in *Shaffer v. Carter*, 252 U. S. 37, at page 58, as follows:

"Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

See, also:

Cream of Wheat Company v. County of Grand Forks, 253 U. S. 325, 330;

Citizens National Bank v. Durr, 257 U. S. 99, 109;

St. Louis Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 367, 368;

Tennessee v. Whitworth, 117 U. S. 129, 136, 137;

Compare:

Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58;

Kidd v. Alabama, 188 U. S. 730, 732;

Coe v. Errol, 116 U. S. 517, 524.

2. A system of Taxation Discriminating Between Property Leased to an Operating Public Utility and That Owned and Operated by the Public Utility Is Not so Arbitrary as to Be in Violation of the Fourteenth Amendment.

Since no federal question is raised by the mere presence, if any, of double taxation in the present case, it remains to determine whether there is any unconstitutional discrimination in singling out for such double taxation the leased property of public utilities as distinguished from property owned and operated by the utilities. We are still assuming, solely by way of argument, that double taxation and discrimination are present in the tax in question.

The basis of classification has been well stated by this court in *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, in which this court considered an appeal from a decree dismissing a bill in the Federal Circuit Court in Michigan to enjoin the operation of a gross receipts tax on telephone companies. It was contended that the Michigan act violated the fourteenth amendment to the Federal Constitution, in that property of telephone and telegraph companies whose gross receipts were less than $500.00 were exempted from the tax. This court stated the result of classification in matters of taxation at pages 328 to 331, as follows:

> "It is manifest, therefore, that there are marked differences between the taxed and non-taxed companies, and the differences might be pronounced arbitrary if the rule urged by appellant should be applied, that is, that in the taxation of property no circumstance should be considered but its value, or,

to use appellant's words, 'each dollar's worth should be treated alike.' But such rigid equality has not been enforced. * * *

"*It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation.* There is certainly as great a power, and the rule appellant urges cannot be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise.

"*In Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237, it was decided that under the power of classification there might be exemption of property dependent upon its species and the rates of excise might be varied upon different trades and products. And it was said that it was safe to say 'that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation.' *It was pointed out that to give it that effect would destroy the constitutional provision and laws of some of the States which, while enjoining uniformity of taxation, permitted exceptions which were deemed material*, and that 'it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt.'

"*In Pacific Express Company v. Seibert*, 142 U. S. 339, *a distinction, for taxing purposes, between express companies which owned their own means of transportation and those who engaged for hire a railroad or steamship company to transport their merchandise, was supported.* The range of classification for taxing purposes which was expressed in *Bell's Gap Railroad Company v. Pennsylvania* and *Home*

Insurance Co. v. New York, 134 U. S. 594, 606, 607, was approved. These cases and others were cited in *Michigan Central Railroad Company v. Powers*, 201 U. S. 245, 293, for the same principle of classification and its application to taxation. It was said, 'There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and immunities.' And, further, quoting from the opinion of the lower court, it was said, 'It is enough that there is no discrimination in favor of one against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.' • • • *"Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney v. New York*, 222 U. S. 525, 536. *The State is not bound by any rigid equality. This is the rule;—its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.'* See 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'" (*Citizens Telephone Co. v. Fuller*, 229 U. S. 322, 328-331. (Our italics.)

Again this court has held that "the basis of the classification" need not be "deducible from the nature of the things classified" (*Watson v. State Comptroller*, 254 U. S. 122, 125); that it need not be "either logically appropriate or scientifically accurate," as "there is a strong presumption

that a legislature understands and correctly appreciates the needs of its own people" (*District of Columbia v. Brooke*, 214 U. S. 138, 150); and that "the equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment" (*Middleton v. Texas Power and Light Co.*, 249 U. S. 152, 157). More recently (February, 1927), this court has held in *Swiss Oil Corp. v. Shanks*, 47 Sup. Ct. Rep. 393, at page 395:

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> "It is sufficient, as stated, that there be some adequate or reasonable basis for the classification. (Citing cases.) The particular classification adopted 'is not open to objection unless *it precludes the assumption that (it) was made in the exercise of legislative judgment and discretion.*'" (Our italics.)

See, also:

Stebbins v. Riley, 268 U. S. 137, 143;
National Paper and Type Co. v. Bowers, 266 U. S. 373, 376;
Heisler v. Thomas Colliery Co., 260 U. S. 245, 255;
Maxwell v. Bugbee, 250 U. S. 525, 541;
Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 139;
Kidd v. Alabama, 188 U. S. 730, 733.

Nor is the classification adopted here of such a character that "it precludes the assumption that it was made in the exercise of legislative judgment and discretion."

In *Bank of California v. Roberts*, 173 Cal. 398, the Supreme Court of California had before it an action to recover taxes paid under protest by the plaintiff, a national banking association, on behalf of its stockholders on the value of its capital stock, including in its valuation 2500

shares of stock held by it in the National Bank of D. O. Mills & Co., and 1049 shares in the Mission Bank, a state corporation. It was contended before the state court that this constituted a double taxation of the stock of the Mills and national banks in the hands of the Bank of California, contrary to the provisions of the California and Federal Constitutions, and also to section 5219 of the Revised Statutes of the United States permitting taxation of shares of stock of national banks. At page 403, the state court held that since the amendment to section 1 of Article XIII read: "All property in the state *except as otherwise in this constitution provided,* not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, *or as hereinafter provided,*" the California Constitution expressly permitted double taxation as a result of the existing system of taxation of public utility gross receipts and bank stock.

Counsel for respondents at page 17 of their brief have contended that section 3607 of the Political Code prohibits double taxation and Article XIII, section 1 of the California Constitution, "with certain limited exceptions" required taxation in proportion to its value. The court in the case cited above construed these *exceptions* provided in section 14 and expressly stated that it not only might but *did* require double taxation in certain cases. That section 14 of Article XIII is paramount to the code section relied on by our opponents, of course, cannot be questioned. The cases cited on page 17 of their brief as to the denial of "equal protection of the laws" arising out of double taxation in the face of state constitutional prohibitions are not in point here upon this ground as well as that urged

under point I-A hereof. (See, also, discussion under V, *infra*.)

The *Bank of California Case* later came before this court upon writ of error and is reported as *Bank of California v. Richardson*, 248 U. S. 476. In reversing the decision, this court rested its decision entirely upon the interpretation of section 5219, permitting taxation of national bank stock. It would seem, therefore, that this court has impliedly held that the distinction made by the state court in this case that corporations, having statewide assets and taxed through the gross receipts provisions of Article XIII, section 14, of the California Constitution, may be subjected to double taxation while private property is not so taxed, will not constitute an unconstitutional classification of property for tax purposes.

As to constitutionality of gross receipts taxes levied on limited classes of property, see:

Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 139;

Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 455;

U. S. Express Co. v. Minnesota, 223 U. S. 335, 347;

Adams Express Co. v. Ohio, 165 U. S. 194, 223;

Pacific Express Co. v. Seibert, 142 U. S. 339, 354.

We can therefore say that the classification between utilities and ordinary property is not invalid under the fourteenth amendment.

The further question presenting itself is whether a classification distinguishing between property *owned* by public utilities taxed solely through the gross receipts of the company, and property *leased* to public utilities paying

a tax through their gross receipts and also being taxed locally (we are still assuming without admitting the respondents' theory), is an unconstitutional classification under the cases above referred to.

We submit that this question has already been passed upon by this court contrary to the position taken by the Circuit Court of Appeals. As early as *Pacific Express Co. v. Seibert,* 142 U. S. 339, this court had presented to it for consideration, from its constitutional aspects, a statute of the State of Missouri providing a 2% gross receipts tax upon common carriers conveying various named articles by express on contract with any railroad or steamboat company. This statute was attacked by counsel for appellant in an appeal from a decree dismissing the complaint as set forth in the summary of his argument quoted at pages 346 to 347, as follows:

> "The legislature, in defining what should constitute an express company for the purposes of the act, evidently intended to exclude all express companies or persons doing the business described in the act, who own their own lines of transportation or procure transportation facilities by contract with some other person or corporation than a railroad or steamboat company. Yet it is obvious that a railroad company doing the character of business specified in the section defining an express company, over its own line of railroad, would still be an express company with respect to that particular business, notwithstanding any effort of the legislature to exclude it by definition."

The court in affirming the decree of dismissal said at pages 352 to 354:

> "The contention of the complainant, however, in this connection is, that the rule of uniformity and

equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed under the act, imposing upon certain persons or associations taxes from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt. In other words, the contention is, that the act of the legislature arbitrarily defines what shall constitute an express company, and then lays a tax upon its business, while at the same time it permits the same kind of business to be done by any person or company not embraced within the class thus defined, without being subject to any tax at all. It is said that the act, by the very terms of its definition, restricts the tax to persons or corporations who carry on the business of transportation *on contracts for hire with railroad or steamboat companies* doing business within the State; and that it permits any person or company that may be so fortunate as to *own* its own means of transportation to go free from any such tax.

* * * * * * * * * *

"The legislation in question cannot be considered as invidiously discriminating against the express companies defined by it and in favor of other companies or persons that may carry express matter on certain other conditions or under different circumstances. There is an essential difference between express companies defined by this act and railroad or steamboat companies or other companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their road-beds, rolling stock and other tangible property as well as, generally, upon their franchise; and steamboat companies likewise pay a tax upon their tangible property. This tax is not necessarily an *ad valorem* tax at the same rate as is paid on other private property in the

State belonging to individuals. Generally, indeed, it is not, but is often determined by other means and at different rates, according to the will of the state legislature. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337. On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. *In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes.* There can be no objection, therefore, to the discrimination made as between express companies defined by this act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character and means of doing business justify the discrimination in this respect which the legislature has seen fit to impose. * * * we do not see how, under the principles of the many decisions of this court upon the subject, it can be held violative either of the Fourteenth Amendment of the Constitution of the United States, or of the provision in the constitution of Missouri, relating to equality and uniformity of taxation." *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352-4. (Our italics.)

More recently the same question has been presented to this court in connection with the Minnesota laws for taxation of iron mining. In *Oliver Iron Co. v. Lord*, 262 U. S. 172, there was presented to this court, for review as to constitutionality, an act (Chap. 223, Minnesota Stat-

utes 1921), which provided for a tax upon persons engaged in mining equaling 6% of the value of the ore mined or produced. It was pointed out to the court that it was customary in Minnesota to lease mining properties and for the actual mining operation to be conducted by lessees and not by owners. It was further pointed out that the act provided that lessees could deduct from the value of the ore mined the amount of royalties paid but that no deduction was permitted to owners for their expenses of mining. In other words, the act was attacked on two grounds. First, that the interest of lessors arising from their royalties was entirely untouched by the act; and secondly, that as between lessee-operators and owner-operators, the owners were discriminated against. As to the first point, this court said at page 179:

> "Here the selection is of all who are engaged in mining or producing ores on their own account, that is to say, as owners or lessees. *The selection seems to be an admissible one, so we turn to the objections urged against it.*" (Our italics.)

The court plainly held that it was within the power of the state to classify for tax purposes in such a way as to exclude lessors of property while including lessees. We submit that the converse situation is presented here and that the rule laid down in the *Oliver Iron Company Case* could be applied in reverse fashion so that the interest of the lessor might be doubly taxed instead of being exempted, as in the *Oliver Iron Company Case*, inasmuch as from a constitutional viewpoint the same type of classification is presented in both cases.

The exact question, however, was presented to this court later as a result of the amendment in 1923 of the Minne-

sota statute (Chap. 226, Minnesota Statutes 1923), in which it was provided that:

> "There shall be levied and collected upon all royalty [from mining operations] received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter * * * a tax of six (6%) per cent." (Quoted p. 228.)

In *Royal Mineral Association v. Lord*, 13 F. (2nd) 227, an action was brought by holders of royalties under mining leases in the federal district court in Minnesota to enjoin the enforcement of a tax, it being claimed that the tax was in violation of certain provisions of the state constitution and also of the fourteenth amendment to the Federal Constitution. The attack on the latter ground was based upon the fact that the royalties in question had been assessed under the head of moneys and credits in the hands of the royalty holders, thus resulting in double taxation and discrimination against royalty holders, as distinguished from those who owned and operated their own mines. The court held that lessee and lessor of the same property came for taxation purposes within two entirely separate classes and that a different rate of taxation or no tax at all might be levied upon one class without affecting the validity of the tax upon the other, saying at page 232:

> "Next is the identification of the separate interests here involved for purposes of taxation, or the classification thereof. As already indicated, as the mining operation and the depletion of the property are usually carried on, there are two classes of persons, or two sets of interests, and no more, concerned therein. They are the operator who does the mining, and the owner whose ore is being mined, and the respective interest of each. The interests of an intervening

lessee are identified with those of the owner for the purposes here in mind. Although together the owner and the operator are possessed of the entire interest in the property, their relations thereto are markedly different. *So great is that difference that one class or set of interests may be taxed without the other, as was done by the act of 1921, and doubtless different rates of taxation may be imposed, and, as will be seen, different forms of tax may be levied thereon. There is no practical difficulty in recognizing these two classes as separate and distinct for purposes of taxation, and in according uniformity of treatment to all within each class.* It is a matter largely of specifying interests, very different in character, which it is sought to reach for purposes of taxation. One is dealt with in the act of 1921. *The right to select that interest as the basis for the imposition of a separate tax is recognized in Oliver Iron Mining Co. v. Lord, et al., supra.* Although the tax under the act of 1921 is an occupation tax, the same is levied because of the operator's relation to the land, and, in the last analysis, because of his interest therein. By the act of 1923, the entire remaining interest is made the basis for the tax there imposed. In cases where there is but one ownership, the tax is imposed under the act of 1921." (Our italics.)

This case later came before this court in *Lake Superior Consolidated Consol. Iron Mines v. Lord*, 271 U. S. 577. Although it did not expressly pass upon the classification distinguishing between lessees and lessors, this court did say at pages 582-83:

"There is nothing to show purpose by the state officers to insist upon a construction or application of the statute which would deprive appellants of their constitutional rights; and, considering the true con-

struction of the Act, no ground appears which would justify an injunction to prevent them from proceeding with its orderly enforcement."

We therefore submit that this court has previously held that a tax discriminating between leased and owned property is not such an arbitrary classification as to violate the fourteenth amendment. Assuming that the contention of respondents is correct that in the present case there is a double tax levied solely on property which is leased to public utilities, as distinguished from property owned by public utilities, we submit that the complaint still fails to show any violation of the rights of respondents under the fourteenth amendment to the Federal Constitution.

3. Respondents Must Prove Their Case Upon the Facts as Alleged in the Record and This Court Will Not Determine a Question of Constitutional Law Upon Hypothetical or Imaginary Cases.

In earlier litigation involving the same proposition of law, counsel for respondents have assumed many hypothetical facts showing, as they assert, the alleged discriminatory effect of Article XIII, section 14, as interpreted by us. In this way they have attempted to show what they claimed was an unquestionable violation of the fourteenth amendment arising therefrom. While we do not admit that, even in the hypothetical cases suggested, there would be any federal question presented to this court, yet we contend that it has long been the rule that this court will not consider constitutional points unless presented on the record of the case itself.

Thus in *Pullman Company v. Knott*, 235 U. S. 23, this court had before it the validity of the Florida gross re-

ceipts tax law levying a tax upon the gross receipts of sleeping car and parlor car companies upon the ground that it was unconstitutional in failing to include within its provisions railway companies operating and owning sleeping and parlor cars. At pages 25 to 26, this court said:

> "It is suggested that there is an arbitrary classification because the tax is confined to sleeping and parlor car companies and does not fall upon railroads operating their own sleeping and parlor cars. If otherwise this were a valid objection, as to which we need express no opinion, it is enough to say that a tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are. *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224. It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the Attorney General of the State denies that such a case exists."

Again, in *Oliver Consol. Iron Mining Co. v. Lord*, 262 U. S. 172, in which it was claimed that a royalty tax of Minnesota imposed on mining operations based upon 6% of the value of the ore produced discriminated against operators who also owned their properties (the converse of the claim presented here), because lessee operators were permitted by the statute to deduct the amount of the royalties paid before computing the tax, while owners were not permitted to deduct their cost of operation, this court said at pages 180 to 181:

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is 'The amount of royalties paid on the ore mined and produced during the year.' This provision is assailed as working a serious discrimination in

favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one and has not been before the Supreme Court of the State. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional provision. After that it may be that there would be need for turning to the Fourteenth Amendment. 'Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto.' *Hendrick v. Maryland*, 235 U. S. 610, 621; *Hatch v. Reardon*, 204 U. S. 152, 160; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544. The record shows that of the many iron mines in the State all but six are operated under leases and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore, no tax could be imposed in respect of the six mines based on that year's operations, and it is made plain that the defendants have no purpose to impose one. It cannot be merely assumed that mining has been resumed at those mines nor that any tax in respect of them for later years is now threatened. The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open."

In the instant case, therefore, any argument not based upon the facts as set forth in the bill of complaint cannot be raised in order to show the unconstitutional effect of the instant tax to sustain the allegations of unconstitutionality contained in the bill of complaint.

We have heretofore shown that in so far as the bill alleges double taxation no federal question is presented on the face of the bill. We have further shown that in so far as the bill alleges double taxation upon a single class of property leased to public utilities as distinguished from property owned by public utilities that this court has held, although impliedly, in the recent decision in *Lake Superior Consolidated Iron Mines Co. v. Lord*, 271 U. S. 577, that this class is a generic one and will sustain a difference in mode or degree of tax levied thereon.

It is not incumbent upon us to find or suggest reasons for the exercise of legislative discrimination, but it is suggested that the very situation adverted to by the Railroad Commission in the reported cases cited in point III hereof as to the difficulty of control over private corporations furnishing equipment used by operating utilities might have been sufficient to cause the legislature to attempt the control of the situation in the manner suggested by respondents.

In any event, both the double taxation and the discrimination resulting therefrom have been held not to constitute violations of the fourteenth amendment. The allegations of unconstitutionality contained in the bill of complaint are therefore within the rule set forth above that when the federal question raised is formal, frivolous or foreclosed by prior decisions no federal jurisdiction is set forth. In this case we believe it appears that prior decisions of this court have foreclosed the question attempted to be raised thereby and that this court should remand the case to the district court for dismissal for lack of federal jurisdiction.

C. The Bill of Complaint Fails to Allege a Substantial Ground of Invalidity Under the Fourteenth Amendment Since the Tax in Question, Levied by Subordinate Agencies for Local Purposes and Not by State Officers, and, on the Theory of the Bill, in Plain Conflict With the California Statutes and Constitution Could Not Constitute an "Act" of the State Within the Meaning of the Amendment Until Passed Upon by the State Courts.

Under the preceding heading we have pointed out that the allegations of the bill of complaint failed to set forth a federal question or jurisdiction because the tax complained of does not violate the test of the "law of the land" imposed by the fourteenth amendment under either the "due process of law" or "equal protection of the laws" heads. The invalidity of the tax in question and the rights of respondents resulting therefrom, as we pointed out, rested entirely upon a construction of a state constitutional provision, Article XIII, section 14, of the California Constitution, and not, as necessary to raise a federal question, upon a construction of a federal statute or constitutional provision.

In our argument as to the lack of a federal question under the "equal protection of the laws" head, as well as the "due process" head, we adverted to the fact that since the tax was not levied by a state official, or on behalf of the state, or by virtue of any state law or line of state court decisions, no state "act" was alleged unless it was assumed that the California Constitution itself authorized the tax. Under this heading, we purpose to show that this follows inevitably from the past decisions of this court and if the court holds, as a result of other allegations con-

tained in the bill of complaint, that the bill must be construed as setting up the invalidity of the tax under the state constitutional provisions, that it fails utterly to state a federal question as it does not allege any state "act" within the meaning of the fourteenth amendment.

Our fundamental premise under both heads is that a bill of complaint which alleges the invalidity of a tax solely by virtue of state constitutional provisions, which tax would be valid under the fourteenth amendment if authorized by the fundamental law of the state, prior to decisions construing the state constitution as to the point involved by state courts, as distinguished from a tax levied by virtue of a state law alleged to be contrary to the state constitution, fails to state a federal question and therefore jurisdiction in the federal courts. The sole question then presented is one of state constitutional law and should be left to the state courts for determination.

This court has long held that the fourteenth amendment is not aimed at acts of individuals but at the state itself or persons acting on behalf of the state. Thus this court in *Virginia v. Rives*, 100 U. S. 313, said at page 318:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights. Sect. 641 was also intended for their protection against State action, and against that alone.

"It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

See, also:

Corrigan v. Buckley, 271 U. S. 323, 329;
Civil Rights Cases, 109 U. S. 3, 11;
United States v. Harris, 106 U. S. 629, 639.

The ultimate question in every case of an alleged violation of the fourteenth amendment is the "power" of the state to act. Thus in *Missouri v. Dockery*, 191 U. S. 165, this court had before it a writ of error to the Missouri Supreme Court upon a judgment quashing an alternate writ of mandamus to the State Board of Equalization. The petition alleged that the board had assessed all of the taxable property of various public utilities, including telephone companies, at a certain percentage of their actual value while it exempted from any tax express companies. Allegations that the petitioner would be deprived of his property without due process and would be deprived of the equal protection of the law were contained in the bill. This court said at pages 170 to 171:

"But his rights under that amendment turn on the power of the State, no matter by what organ it acts. *Virginia v. Rives*, 100 U. S. 313, 318. Therefore, if the Supreme Court of the State construed the statutes as exempting express companies from this tax and substituting another, as it is argued on behalf of the defendants in error that the statutes do, the petitioner cannot complain here. *For the legislature could exempt them, and the question whether it has done so or*

> ***not is for the state courts to decide in their construction of its acts.*** Furthermore, if the State could grant a total exemption it could grant a partial exemption, ***and if it has done so, de facto, through its officers, the petitioner cannot come here on an allegation that the officers acted as they did without the authority of the State. That again is for the state court to decide.*** The petitioner has no case under the Constitution of the United States, and nothing else is open." (Our italics.)

See, also:

Patterson v. Colorado, 205 U. S. 454, 459.

As stated by the court in the *Rives case*, states must act through agencies. When acting on behalf of the state the act of the state agent becomes that of the state itself. In *Barney v. City of New York*, 193 U. S. 430, 437, this court had before it on appeal from a decree of a circuit court dismissing a bill to enjoin the construction of a tunnel in New York City by the Rapid Transit Board alleged to be contrary to state law, the question as to what acts of public officials were to be construed as the acts of the state. The court, at pages 439 to 441, stated its views as follows:

> "There are many cases in this court involving the application of the Eleventh Amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii;* and in *Pennoyer v. McConnaughy*, 140 U. S. 1, Mr. Justice Lamar defined the two classes to be, those brought against officers of the State as representing the State's action and liability, and those against officers of the State when claiming to act as such without lawful authority. The subject is discussed at length and the cases cited in *Tindal v. Wesley*, 167 U. S. 204, and *Fitts v. McGhee*, 172

U. S. 516. Appellant's counsel rely on certain expressions in the opinion in *Ex parte Virginia*, 100 U. S. 339, but that was a case in which what was regarded as the final judgment of a state court was under consideration, and Mr. Justice Strong also said: 'Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.'

"And see *Manhattan Railway Company v. City of New York*, 18 Fed. Rep. 195; *Kiernan v. Multnomah County*, 95 Fed. Rep. 849; *In re Storti*, 109 Fed. Rep. 807.

"*Scott v. McNeal*, 154 U. S. 34, and *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, are cited by appellant, but in those cases judgments of the highest judicial tribunals of the State were treated as acts of the State, and no question of the correctness of that view arises here.

"And so in *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, the general assembly of Texas had established a railroad commission and given it power to fix reasonable rates, with discretion to determine what rates were reasonable. The act provided that suits might be brought by individuals against the commission 'in a court of competent jurisdiction in Travis County, Texas,' and a citizen of another State sued them in the Circuit Court of the United States for the district which embraced Travis County, and this was held to be authorized by the state statute.

"And as the establishment of rates by the commission was the establishment of rates by the State itself,

and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly.

"Similarly, in *Pacific Gas Imp. Company v. Ellert*, 64 Fed. Rep. 421, where a public board was given power to improve streets, and proceeded in excess of its powers but not in violation of them, its action was regarded by Mr. Justice McKenna, then Circuit Judge, as state action.

"*In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions.*" (Our italics.)

The gist of the decision is stated at page 437, as follows:

"Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only *not authorized*, but was *forbidden* by the legislation, and hence was *not action by the State* of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction." (Our italics.)

Since the *Barney case* there have been many decisions by this court which arose out of acts of public officers alleged to have been state "acts" forbidden by the fourteenth amendment. Two of these are relied upon by respondents as overruling the rule of the *Barney Case*, although at least the first expressly distinguished it. (Respondents' brief p. 8.) In *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, this court held that since the act of the State Board of Equalization was not *contrary* to any state law, it must be considered what the earlier case had called an act *virtute officii*, saying at page 37:

> "This action resulted in an illegal discrimination, which, under these facts, was the action of the state through the board. *Barney v. City of New York*, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

In *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, this court had presented to it an appeal from a decree of a district court refusing to issue a restraining order prohibiting enforcement of an alleged confiscatory telephone rate ordinance of the city. It was contended by the city that the ordinance did not constitute an "act" of a state within the rule of the *Barney case*. This court, however, held that a case of an act of a public officer *virtute officii* was made out, saying at page 294:

> "But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a state are embraced by the Fourteenth Amendment."

It must be noted also, as pointed out in our brief in support of petition for writ of *certiorari* (p. 10), *that the latter case involved a claim as to the power of the state itself*. It would be idle, therefore, if on any theory the state had acted, to remand the case to the state courts in a matter which involved primarily a federal question. *This is not the situation presented in either the Barney or this case*. In both the sole question, as pointed out previously, is whether the state had authorized the act complained of, inasmuch as the power of the state to authorize a double tax or discrimination of the character alleged to

be present here has been foreclosed by the decisions cited in point I, B hereof.

Indeed, if the rule laid down by this court in the *Home Telephone and Telegraph Co. Case*, 227 U. S. 278, 288, be correct, that the authority to do the act must be assumed, under the facts of the existing case, the bill would state no cause of action because the validity of the case would then of necessity have been admitted except as to the direct violation of the fourteenth amendment which, as we have shown above, is foreclosed by the prior decisions of this court.

As we read the *Barney case*, as explained in the light of later decisions, only four situations in which the act is alleged to be contrary to the state constitution are presented which constitute an act of a public officer *virtute officii* and not *colore officii*, or four cases where acts of a public official contrary to the state constitution will bind the state and constitute a "state act" within the fourteenth amendment:

1. Where the act is done by an executive officer or board of the state itself contrary to the provisions of the state constitution. The officer or board is deemed to be the state itself in such cases. (See discussion by this court in *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 37. Compare the language used in the *Barney case*, 193 U. S. 440, anent the decision in *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362: "the establishment of the rates by the commission was the establishment by the State itself * * *."

2. Where the act is done by a local officer pursuant to a municipal ordinance directly authorized by valid state

law. (*Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 294.)

3. Where the act is done by a local officer pursuant to decisions of the highest state courts construing state constitutional provisions. (Here the judicial determination is deemed to be the "act" of the state. See *Barney v. City of New York*, 193 U. S. 430, 440.)

4. Where the act is one by a local officer pursuant to a state statute expressly authorizing the act which is alleged to be contrary to the state constitution. (*Johnson v. Wells Fargo & Co.*, 239 U. S. 234. In this case the real "act" involved is that of the state legislature.)

Every one of the cases cited by the respondents (Respondents' brief, p. 7) comes within one of these classes and are therefore perfectly consistent with the rule of the *Barney case*. It must also be noted that in most, if not all, of these cases the constitutional point turned squarely upon the fourteenth amendment and "the law of the land" test; not as here upon an alleged failure to comply with state constitutional requirements resulting in a violation of the "equal protection of the laws."

Greene, Auditor of Kentucky, et al. v. Louisville etc. R. Co., 244 U. S. 499, 508 (State Board of Valuation and Appraisements);

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35 (State Board of Equalization);

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97-98 (State Executive Council);

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445 (act of County Assessor and Board of Equalization but after approval and hearing in state supreme court);

Keokuk etc. Bridge Co. v. Salm, et al., 258 U. S. 122, 123-124 (act of County Assessor pursuant to decisions of state courts, decree of dismissal affirmed for lack of equity jurisdiction. Point not raised on briefs);

Louisville etc. R. R. Co. v. Greene, Auditor, et al., 244 U. S. 522, 528 (State Board of Valuation and Appraisements);

Terrace v. Thompson, Attorney General, et al., 263 U. S. 197, 214 (State Attorney General acting under provisions of state law alleged unconstitutional);

Illinois Central R. Co. v. Greene, Auditor, et al., 244 U. S. 555, 559-60 (State Board of Valuation and Assessment);

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462 (action of city in appropriating water rights of plaintiff. Court relied (p. 464) on fact that city ordinance in question was in conformity with state law so authorizing);

Home Telephone Co. v. City of Los Angeles, 227 U. S. 278, 287 (municipal ordinance deemed done on behalf of state through power given by state to city to adopt);

Siler et al., Commissioners, v. Louisville etc. R. Co., 213 U. S. 175, 190-191 (action of State Railroad Commission acting under alleged unconstitutional state act);

San Francisco National Bank v. Dodge, 197 U. S. 70, 75 (local assessment under express authority of code section alleged contrary to federal act permitting state taxation of national bank property);

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390-391 (act of State Railroad Commission).

We submit, therefore, that the instant case comes within the rule of the *Barney Case*. The tax in question was levied by a county officer on behalf of the County of Los Angeles and certain cities for purely local purposes. Not one cent of the tax will ever reach the coffers of the State of California. It was therefore not done on behalf of the state by a state board or official within the meaning of the first class of cases. The tax was not levied pursuant to any delegated power of the state through the medium of a local ordinance. The tax was not levied pursuant to any line of decisions which would make the tax a state "act." The tax was not levied pursuant to any special statute invalid under the state constitution, but was levied solely by virtue of the provisions of that document itself Article XIII, section 1 of the California Constitution providing:

> "All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided."

Therefore, if we consider the allegations of the complaint to contend that the tax levied in the instant case was an invalid one under the provisions of the California Constitution, the case clearly comes within the rule of the *Barney Case* in which this court held that no federal question or jurisdiction was presented by a bill alleging acts of individuals contrary to the expressed mandates of state law.

We therefore submit that no matter whether we consider the tax in question was valid under the state constitution and therefore a state "act," or invalid thereunder and therefore not a state "act," the allegations of a federal

question contained in the bill of complaint are purely formal and, no matter what theoretical grounds they may set forth, are foreclosed by long established decisions of this court. The sole substantial question presented by the bill is one of construction of the state constitution and state constitutional law. This court should, therefore, it is respectfully submitted, remand the bill of complaint to the district court with instructions to dismiss for lack of federal jurisdiction.

II.

ASSUMING, WITHOUT ADMITTING, THAT FEDERAL JURISDICTION IS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT, THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT IT SETS FORTH GROUNDS FOR EQUITABLE RELIEF.

Under our first point we have contended that the bill of complaint fails to set forth a substantial federal question and therefore does not show jurisdiction of the case to be in the federal district court. Without admitting that the allegations of the bill are sufficient in this respect, we further contend that the allegations fail to show jurisdiction in the federal District Court in that no grounds for equitable relief are set forth therein, and that the Circuit Court of Appeals erred in holding that the bill of complaint was sufficient in this regard. [R. 88.]

Mere invalidity of a state tax is not a ground for injunctive relief therefrom in the federal courts except in the absence of an adequate remedy at law. We believe that the authorities cited below show clearly that such a

remedy was, and still is, open to the respondents by payment of the alleged invalid tax and subsequent suit against petitioner county for its refund under the provisions of sections 3804 and 3819 of the California Political Code.

A. A Violation of a Constitutional Right Is Not a Ground for the Exercise of Equity Jurisdiction Unless the Plaintiff Has No Adequate Remedy at Law.

It has long been recognized that an invalid or unconstitutional state tax will not be enjoined by the Federal courts if the taxpayer may pay the tax under protest and bring an action to recover the sum paid.

Thus this court in the leading case of *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, through Mr. Justice Moody, stated the rule as follows, at pages 281-2:

> "A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. * * * It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. *Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.* It has been held uniformly that the illegality or unconstitutionality of a state or mu-

nicipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity." (Our italics.)

See, also:

Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122, 125;

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282;

Dalton Machine Co. v. Virginia, 236 U. S. 699, 701;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485;

er, Auditor of State of

Oklahoma v. Wells Fargo & Co., 223 U. S. 298, 301;

Arkansas Building Association v. Madden, 175 U. S. 269, 270;

City Council of Augusta v. Timmerman, 233 Fed. 216, 218;

Denison v. Keck, 13 F. (2nd) 384, 388 (C. C. A.).

Certain language contained in recent pronouncements of this court and other federal tribunals would seem to be contrary to the doctrine so clearly enunciated in *Boise Artesian Water Co. v. Boise City, supra.*

See:

Risty v. Chicago R. I. & P. Co., 270 U. S. 378, 388;

Chicago, Burlington & Quincy R. R. Co. v. Osborne, 265 U. S. 14, 16;

Smyth v. Ames, 169 U. S. 466, 516;

Franklin v. Nevada-California Power Co., 264 Fed. 643, 645;

St. Louis-San Francisco Ry. Co. v. McElvain, 253 Fed. 123, 136.

But the apparent inconsistency is explained by Mr. Justice Holmes in *Chicago, Burlington & Quincy R. R. Co. v. Osborne, supra*, in which this court held that the decision of the District Court dismissing a bill to enjoin an alleged unconstitutional tax of the state of Nebraska because of the adequacy of the action at law in the state by writ of error from the State Board of Equalization to the State Supreme Court was erroneous, saying at page 16:

> *"If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 486. But the writ of error of course can be sued out only in the State, and a remedy in the State courts only has been held not to be enough. *Smyth v. Ames*, 169 U. S. 466, 516; *St. Louis-San Francisco Ry. Co. v. McElvain*, 253 Fed. 123, 136; *Franklin v. Nevada-California Power Co.*, 264 Fed. 643, 645. That however is not the only objection. On a writ of error the Court is confined to the record. The most that it could do, it would seem, would be, if errors appeared on the face of the record, to set aside an excessive valuation and remit the matter to the same Board to try again, which is hardly satisfactory, if the Board is seeking to evade the law." (Our italics.)

And again in *Risty v. Chicago, R. I. & P. Ry. Co., supra*, this court, in affirming a decision of the District of the Circuit Court of Appeals enjoining an assessment district proceeding, said at page 388:

> "It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the Federal courts • • •."

We therefore submit that it is the long established rule of this court that a federal tribunal, in the absence of diversity of citizenship as here, has no equity jurisdiction to enjoin the collection of a state tax simply because it is alleged that such a tax is unconstitutional, *provided the taxpayer has an adequate remedy at law for the recovery of the tax which, if diversity of citizenship had existed, could have been pursued in the federal courts, or, in the absence of diversity of citizenship, by writ of error to the state supreme court from this court.*

B. Respondents Have an Adequate Remedy at Law in Their Action for Refund of Taxes Under the Provisions of the California Political Code.

1. Respondents Can Recover Erroneous or Void Taxes After They Are Paid by Recourse to Sections 3804 and 3819 of the California Political Code.

It is our contention that such an adequate remedy at law, available in the federal courts where diversity of citizenship exists, was open to respondents in the present case by virtue of the provisions of section 3804 of the California Political Code, which reads, in so far as it is pertinent here, as follows:

> "Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid • • • may, by

order of the board of supervisors, be refunded by the county treasurer. * * *

"When the taxes, penalties and costs hereinbefore referred to *are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors,* and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other public corporation.

"No order for the refund of taxes, penalties or costs under this section shall be made except upon a verified claim therefor verified by the person who has paid said tax, or by his guardian, or in case of his death, by his executor or administrator, which said claim must be filed within three years after the making of the payment sought to be refunded." (Our italics.)

a. The Power to Refund Invalid Taxes Lodged in the County Board of Supervisors Is Mandatory, Not Discretionary.

The duty to repay void or invalid taxes imposed upon the county under this section is mandatory, not discretionary, inasmuch as the California courts have construed the word "may" to be read as "must."

Hayes v. County of Los Angeles, 99 Cal. 74, 80;

Otis v. City and County of San Francisco, 170 Cal. 98, 100;

Brenner v. City of Los Angeles, 160 Cal. 72, 79;

Stewart etc. Co. v. County of Alameda, 142 Cal. 660, 661;

Slade v. County of Butte, 14 Cal. App. 453, 460.

See, also:

Uhl v. Badaracco, 199 Cal. 270, 282;

Stockton P. & S. v. Wheeler, 68 Cal. App. 592, 600;

County of Los Angeles v. State, 64 Cal. App. 290, 296.

Void as well as illegal taxes may be recovered under the terms of the section.

Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 145;

San Pedro etc. R. R. Co. v. City of Los Angeles, 180 Cal. 18, 27 (assessment void because included improper element);

Otis v. City and County of San Francisco, 170 Cal. 98, 100 (void as in excess of charter tax limit);

Stewart etc. Co. v. County of Alameda, 142 Cal. 660, 661 (county tax void as levied on property within city).

b. Political Code Sections 3804 and 3819 Provide Concurrent Remedies.

Counsel for respondents (Br. for Resp. p. 13) have contended that

> "The usual procedure in California for recovery of taxes, collected under a void assessment, is by suit, following payment under protest, in accordance with section 3819 of the Political Code.

The section referred to reads, insofar as it is pertinent here, as follows:

> "At any time after • • • the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax col-

lector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment.

"And such owner may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest; * * * and if it shall be adjudged that the assessment, or the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against such county therefor; * * *"

This section has not supplanted the remedy given under the broad terms of section 3804, nor has it provided an exclusive means of access to the courts. Thus in *Stewart etc. Co. v. County of Alameda*, 142 Cal. 660, in which the defendant set up the defense that the plaintiff should have proceeded in accordance with section 3819 and not under section 3804, the California Supreme Court said at page 665:

"We think section 3804 was intended to give relief through the board of supervisors without the necessity of resorting to the courts, while section 3819 was intended to furnish a remedy in certain cases through the courts alone, and when the directions of the act are followed it is provided that the payment of the tax 'shall in no case be regarded as voluntary payment.' *Section 3819 furnishes a remedy entirely independent of that afforded by section 3804 and cannot be regarded as exclusive.* The owner of any property assessed in the county 'may pay the same to the tax collector under protest,' etc., and have his action in

the court as by the act provided. But there is nothing in the act from which an intention of the legislature may be derived that the board of supervisors may not, under the provisions of section 3804, proceed to hear and determine a claim presented under that section. Cases may arise under this latter section which could not be reached by section 3819. *Other cases may arise where the taxpayer might at his option proceed under whichever section he thought most likely to give him speedy relief.*" (Our italics.)

See, also:

Brenner v. City of Los Angeles, 160 Cal. 72, 77.

Nor is the taxpayer, once having paid under protest, required to bring himself strictly within the language of section 3819 as distinguished from section 3804. Thus in *Brenner v. City of Los Angeles*, 160 Cal. 72, an action for refund of taxes paid under protest (p. 73) under a city ordinance analogous to section 3804 (p. 77), the court construed the action as if it were brought under section 3804 and did not attempt to limit the plaintiff to the provisions of the ordinance applicable solely to recovery of taxes paid under protest (pp. 78-79).

c. Respondents, as Lessees of the "Talking Sets" or the American Telephone and Telegraph Company, as Owner, Could Pay the Tax and Recover the Sum Paid, if the Tax Were Held Invalid.

Counsel for respondents have contended (Respondents' Brief p. 13) that due to the language used in section 3819, no one but an *owner* could recover an invalid tax paid under protest, citing *Warren v. City and County of San Francisco*, 150 Cal. 167, 170. Reference to the case discloses that it is not concerned with the proposition for

which it is now cited. The property which plaintiff in that action redeemed from a delinquent tax was a public street not subject to taxation. In holding that the payment was voluntary and therefore no recovery could be had, the court showed the lack of any compulsion upon the plaintiff to pay, saying at page 170:

> "Section 3819 of the Political Code has no application. That section provides that the 'owner' of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest; and that when so paid under protest the payment shall not be regarded as voluntary. The plaintiff herein was not the 'owner' of the land assessed nor of any land bordering or adjoining that portion of Caroline street * * *."

Any suggestion that no one but an owner can recover taxes paid under protest appearing in the case, must be regarded as purely *dictum*, for subsequently the California courts have held that persons who were not *owners* were entitled to recover not only under section 3804, but also where the tax had originally been paid under protest in compliance with the provisions of section 3819.

> *San Pedro etc. R. R. Co. v. City of Los Angeles*, 180 Cal. 18, 27 (lessee paying under protest);
>
> *Slade v. County of Butte*, 14 Cal. App. 453, 461 (holder of certificate of purchase of state land prior to issuance of patents not under protest.)

See, also:

> *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 145 (Lessee plaintiff—application of section 3804 assumed by court).

The fundamental defect in respondents' argument is, however, that the tax in question here was not levied upon them as lessees, but upon the American Telephone & Telegraph Co. as owner of the "talking sets." It would have been paid by that corporation as the owner and, therefore, it would have been strictly within the most technical interpretation of both section 3819 and section 3804.

Finally, it is possible for an injured taxpayer to bring suit under section 3804, as well as section 3819, inasmuch as if the Board of Supervisors waits an unconscionable time after the presentation of the claim to it, the claim is deemed denied and an action by law may be had at once. Thus section 4078 of the Political Code, the general section providing when claims against a county shall be deemed to be denied, reads, insofar as it is pertinent here, as follows:

> "If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day, and the claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterwards • • •."

See, also:

> *Otis v. City and County of San Francisco*, 170 Cal. 98.

Inasmuch as the time for filing a claim under section 3804 of three years does not begin to run until the payment of the tax, it is evident that if this court reverses the decision of the Circuit Court of Appeals and affirms that

of the District Court in dismissing the bill of complaint, the respondents here would still have their remedy at law under section 3804 and section 3819.

It is, therefore, evident that the tax in question here, if invalid or illegal, could have been recovered back after payment in an action under section 3804 of the Political Code after presentation of a claim therefor to the Board of Supervisors, or immediately after payment under protest in accordance with section 3819. In either case, the rights of respondents would have been the same as to the extent of the liability of the county, and could have been brought by respondents as lessees or by the American Telephone & Telegraph Co. as owner of the property in question.

d. Respondents Could Recover the Entire Tax Paid Including the Cost of Collection of Such Portion as Was Municipal in Their Subsequent Action at Law.

Respondents have contended (Respondents' Brief p. 15) that in no case can they recover in an action at law against petitioner county the full amount of the tax paid inasmuch as the tax in question was collected not only on behalf of the county and certain school districts, for the collection of which petitioner county makes no charge, but also for certain municipalities under California statutes authorizing your petitioner county to make such collections, and charge for its services in return therefor.

The authority to make such collections is to be found in two statutes, not one as respondents allege. (Statutes 1895, p. 219, as amended; Deering's General Laws, 1923, Act. 8464. Statutes 1913, p. 499; Deering's General

Laws, Act 6465.) These two acts provide a procedure by which a city, by ordinance, may transfer to the county the entire burden of assessment, tax collection, and tax refunding. (In California, these are performed by three separate agencies, assessor, tax collector, and auditor.) As a result of the ordinance a complete consolidation of the taxing system, city and county, takes place, even the equalization being made for both by the county board of supervisors. Under the first act (paragraph 6), the county board of supervisors is authorized by order to provide for a charge for collection of "not more than one per cent • • • for collecting the first twenty-five thousand dollars so collected, and one-fourth one per cent for all sums over that amount." The latter act expressly authorizes the city and county to agree upon the sum to be charged. As a matter of fact, acting under this act, your petitioner county collects the taxes for the City of Los Angeles upon a flat annual charge without regard to the amount of taxes collected.

It is therefore apparent that the charge is, and was, intended to be nothing more than a *quantum meruit* payment for the services of the county. It was not intended, and is not the practice, for the percentage, for the cities where taxes are collected under that system, to be deducted from each tax as it is paid. The language quoted from the first act "while in the hands of the county tax collector" (Respondents' Brief p. 15) only authorizes payment of the county through a bookkeeping transaction instead of requiring an issuance of a city warrant therefor.

Furthermore, since under the rule of *Spencer v. City of Los Angeles*, 180 Cal. 103, 117-18 (see Point II, C.) the county becomes an involuntary trustee for the tax-

payer of taxes paid under protest, under general principles of trust law, the county could not withhold in consequence any portion of the fund claimed as its charges for the collection thereof.

Of course, the practical and final answer to respondents' argument is that they have actually brought suit for sums paid to petitioner county as taxes paid under protest, and have, where the tax was held invalid in a subsequent suit for refund, recovered judgment in the exact sum paid. (See Point II, C.)

e. This Court Has Held That Statutes Almost Identical With Section 3804 Afforded an Adequate Remedy at Law.

We believe that the provisions of section 3804 and 3819 clearly furnish an adequate remedy at law, as that term has been previously defined by this court.

Thus in *Shelton v. Platt*, 139 U. S. 591, 600, this court, in reversing a decree of the circuit court restraining the collection of an alleged unconstitutional state tax and remanding the bill to the lower court with instructions to dismiss for lack of equitable jurisdiction, held that the following Tennessee statute furnished an adequate remedy at law:

> "That in all cases in which an officer charged by law with the collection of revenue due the State, shall institute any proceeding, or take any steps for the collection of the same, alleged or claimed to be due by said officer, from any citizens, the party against whom the proceeding, or step, is taken shall, if he conceives the same to be unjust, or illegal, or against any statute, or clause of the constitution of the State, pay the same under protest, and upon his making such pay-

ment the officer or collector shall pay such revenue into the state treasury, * * *; and the party paying said revenue may, at any time within thirty days * * * sue the said officer * * * for the recovery thereof, and the same may be tried in any court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected * * * then the court * * * may certify of record that the same was wrongfully paid, * * * and thereupon the comptroller shall issue his warrant for the same * * *." (Quoted p. 593.)

Again in *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 485, this court in affirming a decree dismissing a bill to enjoin an alleged unconstitutional tax, for lack of equitable jurisdiction, declared that the following Colorado statute afforded an adequate remedy at law:

> "in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer." (Quoted p. 485.)

The startling similarity of the language of the Colorado statute to that of section 3804 of the California Political Code is admitted by counsel for respondents in reference to their citation of *Union Pacific Railroad Co. v. Weld County*, 247 U. S. 282, 287. (Respondents' Brief p. 14.) Inasmuch as counsel have stated erroneously that this statute was held by the court in the latter case to afford a "doubtful and inadequate" remedy, we desire to discuss the facts of the latter decision at some length.

In *Union Pacific Railroad Co. v. Weld County, supra,* this court had before it an appeal and *certiorari* to the Circuit Court of Appeals affirming a decree of the district court dismissing a bill to enjoin an alleged unconstitutional state tax upon the ground of lack of equitable jurisdiction due to plaintiff's adequate remedy at law under the refund statute set forth above. At page 285, this court referred to its earlier decision in *Singer Sewing Machine Co. v. Benedict, supra,* holding the Colorado refund statute (quoted in footnote, p. 284) an adequate remedy at law, as follows:

> "If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions."

It then stated at pages 286-7, in reversing the decree of the court below and remanding the case for hearing on the merits, its grounds for so doing as follows:

> "In 1911 Colorado established a state tax commission and conferred on it extensive supervisory powers over the administration of the revenue laws of the State, including the acts of assessors and boards of county commissioners. Laws 1911, c. 216. And in 1913, before the present suit was begun, the State adopted a statute extending the powers of the commission and repealing 'all acts or parts of acts in conflict' therewith. Laws 1913, c. 134. The fifth section of that act says:
>
> " 'No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being [be] first given to

the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings • • • and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado Tax Commission and in case the said Colorado Tax Commission shall disapprove the recommendations • • • they shall endorse their disapproval thereon and return it • • • and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado Tax Commission.'

"Counsel differ widely respecting the effect of this statute on the earlier section (§5750, Rev. Stats. 1908) and on the substantive right given by it to have an erroneous or illegal tax refunded. On the one hand it is said that neither the earlier section nor the right thereby conferred is in any wise affected • • •. On the other hand, it is said that the new statute • • • prohibits any refunding of taxes by the county board save in instances having the approval of the state commission and that in other instances it operates to withdraw • • • all right of action • • • under the earlier section.

"An examination of the new statute shows the controversy just outlined is not without some real basis • • •."

In short this court, contrary to the statement of counsel for respondent, in *Union Pacific Railroad Co. v. Weld County, supra*, reaffirmed its earlier holding in the *Singer Manufacturing Company case* that the Colorado statute, as it had previously read, constituted a complete and adequate remedy at law. This court has, therefore, twice held, in 1912 and again in 1917, that a tax refund statute,

admittedly "like Pol. Code, Sec. 3804," afforded an adequate remedy at law which, if it existed, prevented the exercise of equitable jurisdiction.

2. Inasmuch as Under the California Decisions, the Respondents Can Recover the Tax Complained of, If Invalid, Under the Political Code Sections Cited Above, No Uncertainty of Legal Remedy Is Shown.

Counsel at pages 13 and 14 of their brief have contended that, if the remedy at law is not certain, this court must have equitable jurisdiction over the bill of complaint. While of course we admit, as an abstract proposition, that in such an event this court would have equitable jurisdiction in the premises, yet we submit that we can not see the application of the doctrine to the present bill of complaint.

The California decisions cited above show that the state courts have construed sections 3804 and 3819 to apply to facts identical with those presented in the instant case. We have pointed out that respondents and counsel representing them in this court have on several occasions taken advantage of these sections in suits against your petitioner county. We have further shown that, on at least three occasions, this court has construed tax refund statutes of other states, phrased similarly to section 3804, and in two cases, expressly so admitted by our opponents, as furnishing adequate relief at law and precluding the assumption of equitable jurisdiction. We do not see how we could cite more apposite decisions.

Counsel, however, have referred to certain cases (Respondents' Brief p. 14) to substantiate their argument in this regard. The facts of those cases were so different

from those presented here, that we desire to discuss them briefly. In *Bohler, Tax Collector, et al. v. Callaway*, 267 U. S. 479, 488, this court quoted section 4317 of the Georgia Civil Code which reads, insofar as it is pertinent here, as follows:

> "Payments of taxes • • • are deemed voluntary and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule."

At page 488, this court commented on the effect of this provision in the Georgia code:

> "It would seem to follow that only remedy intended to be furnished in Georgia in such a case as this was by injunction in equity against excessive assesments. If the remedy by law is doubtful, equitable relief may be had."

In *Wilson, Tax Collector, v. Illinois Southern R. Co.*, 263 U. S. 574, 577, this court commented upon the statutory provisions for correction of an invalid tax as follows:

> "It should be added that after the substitution of the State Tax Commission for the Board of Equalization, a provision was made for an appeal from the commission to the Circuit Court of the county 'for the purpose of having the lawfulness of such assessment inquired into and determined' upon a record of the evidence and proceedings before it prepared by the commission, with a further appeal to the Supreme Court. • • • How far such an appeal would be adequate upon a charge of fraud against the commission may be doubted, and the adequacy of a remedy at law must be clear."

In *Dawson, Attorney General, v. Kentucky Distilleries Co.*, 255 U. S. 288, 295, this court discussed the adequacy of the remedy provided at law by state statute, saying:

> "But when these suits were brought (April and May, 1920) the decisions of the highest court of the state left it at least doubtful whether money so paid [for invalid taxes] could have been recovered at law by the taxpayer * * *. It was not until November 16, 1920, which was after these appeals had been entered in this court, that *Craig v. Security Producing & Refining Co.*, 189 Kentucky 565, 568, settled that money paid under such circumstances could be recovered."

In *Wallace v. Hines*, 253 U. S. 67-8, this court commented on the remedy provided by state law as follows:

> "The only ground for supposing that there is such remedy [for refund of invalid taxes paid] is a provision that 'an action respecting the title to property, or arising upon contract may be brought in the District Court against the state the same as against a private person.'"

We have discussed the facts of *Union Railroad Co. v. Weld County, supra*, under the previous heading.

It therefore appears in each of the cases upon which respondents rely to show that this court will assume equitable jurisdiction when the remedy at law is not certain, and, *arguendo*, that in this case the bill of complaint alleged facts warranting equitable relief because of the uncertainty of the legal remedy in California, the facts were totally different from those presented here.

In the first case, the Georgia law provided *no remedy at law at all*. In the *Wilson Case*, this court held that the only remedy provided by the Illinois statute was by

review of the record of the administrative tribunal. The case, therefore, comes within the rule as subsequently laid down in *Risty v. Chicago R. I. & P. R. R. Co.*, 270 U. S. 378, 388, and in *Chicago, Burlington & Quincy R. R. Co. v. Osborne*, 265 U. S. 14, 16, discussed under the prior heading, that judicial review in the state courts of the records of taxation boards and commissions does not constitute an adequate remedy at law, *although such a remedy is presented in an action for the recovery of money paid as a tax when the validity of the tax itself, as distinguished from the record of the administrative body, may be reviewed.*

In the *Dawson Case* the state courts had not determined whether an action was provided by state law prior to the filing of the bill and the taking of the appeal to this court. In the instant case, a statutory refund has been provided in section 3804 of the California Political Code since its adoption in 1872, and the duty to refund after judgment of a court of competent jurisdiction has at least been recognized since the decision in *Hayes v. County of Los Angeles*, 99 Cal. 74, 80, decided in 1893. The *Dawson Case* certainly is not applicable to the facts presented here.

Nor are the *Wallace* and *Weld County* cases applicable. In the first, no refund statute existed at all—at least as the state statute was interpreted by this court. In the second, this court approved the former Colorado refund statute, admittedly similar to section 3804, but held that there was good reason to believe that the statute had been substantially repealed. No suggestion of repeal of either section 3804 or 3819 has been made in the instant case. Instead, respondents and their counsel have been

and still are relying upon the efficacy of these statutes, *under identical facts*, in the state courts.

We submit, therefore, that not only is the remedy provided by sections 3804 and 3819 adequate, but that it is also certain, since there is no question that the respondents in the instant case can take advantage of it at any time in the state courts. (See II, C, *infra.*)

C. Respondents Can Recover the Entire Tax Complained of Here, if Void or Invalid, in a Single Action Against Petitioner County. No Multiplicity of Suits Will Therefore Result.

Counsel have made mention (Respondents' Brief p. 10) of the fact that the tax in question was levied not only on behalf of petitioner county, but also on behalf of various school districts and certain municipalities which have made petitioner county their collecting agency. Counsel insist that multiplicity of suits furnishes an adequate ground for equitable interference with the collection of the tax.

This court, however has held that if an action lies against the county for the whole of the tax paid, it is immaterial for whom it is collected. Thus in *Union Pacific R. R. Co. v. Weld County, supra*, it was said at page 285:

> "That the taxes were levied for state, school district and town, as well as for county, purposes is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be

> effectually removed by paying them and suing to recover back the money. *Allen v. Pullman's Palace Car. Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Assn. v. Madden, supra*, 173."

Section 3804, quoted above, expressly authorizes the refund of taxes collected by the county for other political subdivisions in a claim against the county, providing that:

> "When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municiapl or other public corporation."

But, counsel contend that the County of Los Angeles settles or should settle monthly with these various entities. It may be that when the claim is filed or allowed, either by the Board of Supervisors or after suit under the provisions of section 3804 or 3819, the county will not have in its possession any fund of the various entities on whose behalf the tax was levied. Or it may happen that these entities will have withdrawn from their respective agreements.

In *Indianapolis Manufacturing Co. v. Koehne*, 188 U. S. 681, much the same contention was made. This was an appeal from a decree of the Circuit Court dismissing a bill to enjoin the collection of an alleged unconstitutional Indiana tax on the ground that the plaintiff had an adequate remedy at law in its suit for recovery in accordance with the provisions of the Indiana statute. Before this

court it was urged that inasmuch as the statute, as here, allowed an action only against the county collecting the tax and the tax in question included a state tax, and since after payment of the state portion to the state no action lay therefor, the legal action was inadequate. In affirming the decree below, this court considered this argument at page 686 as follows:

> "The fact that a portion of the money raised by the tax might be for state purposes is not material under the provisions of the act of 1853, *supra*. The courts of Indiana have held that the filing of a petition with the board of commissioners under that act was in itself notice to the county, and if thereafter the money was paid over to the state or to the city, it was no defense; that when the board of commissioners received notice, the county became a trustee for the claimant, and in the event the money was awarded to him the county was bound to refund the same, and a payment by the county authorities after such notice, or the commencement of an action, to the state or town authorities, was at its own risk and peril. The taxpayer could not be required to pursue such funds into the hands of the parties to whom they were wrongfully distributed, and the fact that the taxes were voluntarily paid constituted no defense under the statute cited. * * *"
>
> "There is no doubt, therefore, of the adequacy of the remedy at law * * *."

We submit that the rule of law laid down by the Indiana courts and held by this court in that case to afford an adequate remedy at law which would prevent equitable jurisdiction, is also followed in California. In other words, we contend that when a tax is paid under protest by virtue of section 3819 of the California Political Code

or an action is brought for its refund, under the provisions of section 3804, whether so paid or not, the County of Los Angeles, if paid to it, becomes the trustee of the tax, claimed invalid by the protest or suit, for the taxpayer, and that a judgment will lie against the County for the return thereof, if later found invalid, whether it has in its possession sufficient funds of the respective districts and municipalities or not.

Thus in *Spencer v. City of Los Angeles*, 180 Cal. 103, the California Supreme Court had before it an appeal by the city from a judgment for the return of certain money paid under protest for certain special assessments held illegal by the lower court. The city admitted the invalidity of the assessment, but denied liability for the repayment thereof, on the ground that it had turned the money over to certain defendants in eminent domain proceedings as payment of their judgments, for the satisfaction of which the district had been established. Although the court reversed the judgment for uncertainty as to certain items (page 120), it disposed of the defense of non-possession of the moneys paid to the city at pages 117-118 as follows:

> "The street opening district formed for the purposes of the assessment was not a public corporation, but was a mere area or taxing district which the proper authority had declared to be specially benefited by the proposed improvement. *The city had the right of possession and control of the funds raised by the assessment.* • • • The protest made to the city preserved to the assessment payers the right to recover the same against the city, and it could not thereafter pay out the money in pursuance of the illegal assessment and thereby escape liability

to the property owners. *Upon receiving the money under a protest properly made it was the duty of the city to withhold the funds until the legality of the assessment was ascertained, and when that point was decided against the city it became its duty immediately to return the money to those from whom it had been received.* • • • *Here the city*, having used the money it had illegally collected to pay for the opening of the street *must be deemed to be in the same position* as if it had paid out the same from its general fund." (Italics ours.)

See, also:

Gill v. Oakland, 124 Cal. 335.

It is true that in the *Spencer Case* there are cited several cases which hold that in an action brought for the refund of taxes paid under protest in accordance with section 3819, the taxpayer could not recover back from the county taxes paid over by the county to various school districts subsequent to the protest but before the suit was brought. Thus in *Elberg v. County of San Luis Obispo*, 112 Cal. 316 (1896), the court said at page 317:

"It appears from the complaint that thirteen adjoining school districts in said county united for the formation of the high school district, and the taxes in question were levied by the board of supervisors • • • at the request • • • of said constituent district • • •; that the moneys sued for, when paid to the tax collector, were by him placed in the county treasury, where they yet remain in a fund called the 'San Luis Obispo Union High School Fund.' It is not alleged that the county has or asserts any interest in this fund, or the money sued for, or any right to control the same.

• • • • • • • • •

"If judgment is obtained in such an action against the county, then it must be paid by the county; and no provision is made by which it may have recourse upon the district for the amount thus paid • • •."

See, also:

Pacific etc. Co. v. County of San Diego, 112 Cal. 314 (1896);

Davis v. San Francisco, 115 Cal. 67, 68 (1896);

Easterbrook v. San Francisco, 5 Cal. Unrep. 341 (1896).

To understand the language quoted from the *Elberg Case* and followed in all the other cases on the point, it is necessary to refer to the language of section 3804 as it stood in 1896 when the cases were decided. (California Statutes 1895, p. 331.) It will be seen that by the provisions of the section as it stood at the time of the *Elberg Case*, the section authorized only the refund of county and state taxes. By amendment in 1901 (California Statutes 1901, p. 648), the Board of Supervisors was empowered to repay invalid taxes collected on behalf of school districts and municipalities "out of the appropriate fund of such corporation" upon receipt of a certified copy of the order of the corporation authorizing the board to do so. Later, in 1907 (California Statutes 1907, p. 755), the language quoted above was inserted requiring the Board of Supervisors to refund moneys collected as taxes on behalf of such other bodies in exactly the same manner as those on behalf of the county.

By these amendments, the county retains "control" over moneys collected as taxes on behalf of these other bodies for refund purposes so long as the county retains

possession of the money. The reason for the rule in the *Elberg Case* ceases and *a fortiori* the rule itself.

Civil Code, Sec. 3510.

Therefore, we submit that by the rule of the *Spencer Case*, since under the present language of section 3804 the board of supervisors and the county have control over all funds in the county treasury, whether belonging to the county or not, for tax refund purposes, the county becomes the "trustee" for the taxpayer of taxes paid under protest and cannot set up in a later suit for refund of the money so paid its own breach of duty, of having failed to retain sufficient funds of the appropriate corporation in its possession to refund the amount of the invalid tax. Therefore, if respondents pay the alleged invalid tax under protest, there is no question that they can recover the entire amount, no matter in whose behalf collected, in a single action at law against the county of Los Angeles.

Counsel for respondent will admit, we are sure, that the lower California courts have in fact construed section 3804 as requiring petitioner county to refund all taxes paid to it, no matter on whose behalf they were collected, if the tax itself were paid under protest and subsequently held invalid, inasmuch as these respondents represented by the same counsel have on several occasions recovered judgments against your petitioner county for the total sums so paid, *although in each case a portion of the tax involved had been collected on behalf of various school districts and cities.*

The utmost that can be said for respondents' contention in this regard is that they are asking this court to base its equitable jurisdiction in the premises upon a fan-

ciful and hypothetical state of facts. This court, however, has long made it the rule not to take equitable jurisdiction in cases involving alleged invalid state taxes *unless the need therefor is great.* Thus in *Shelton v. Platt,* 139 U. S. 591, it was contended that the state authorities were about to levy upon the property of the United States Express Company, which was engaged in interstate commerce and was required for its business to pay an alleged invalid state license tax, and "that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience." (Quoted pp. 591-2.) After holding that the Tennessee statute permitted recovery of an invalid tax in an action at law after payment thereof, the court said at page 596:

> "So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and *it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy.*" (Our italics.)

See, also:

Arkansas Building Association v. Madden, 175 U. S. 269, 274;

Lipke v. Lederer, 259 U. S. 557, dissenting opinion per Brandeis, J., 564.

We submit, therefore, that this court should not take equitable jurisdiction upon a fanciful and far-fetched interpretation of the provisions of sections 3804 and 3819 of the Political Code when as the sections are being interpreted by the California courts in suits between the parties to this action, and others, no possibility of multiplicity of actions can arise.

D. That Respondents Cannot Recover Interest on Taxes Paid From the Date of Payment to the Date of Entry of Judgment Does Not Result in Inadequacy of Legal Remedy.

Respondents have also contended that since admittedly they cannot recover, in the event that the tax in question were held invalid, interest upon the sum paid on account of the invalid tax from the date of payment to the date of recovery of the judgment that therefore they have no adequate remedy at law.

(Under California law a judgment for refund of taxes, as every other judgment, bears interest at 7% per annum from date thereof until paid. California Statutes 1919, page LXXXIII, Sec. 1; Deering's General Laws 1923, Act 3757, Sec. 1.)

While it is true that in *Birch v. Board of Supervisors*, 191 Cal. 235, language is used by the court which would seem to indicate that it held in that instance that the failure to recover interest was sufficient to constitute an in-

adequacy of legal remedy, a careful perusal of the decision, *together with the briefs of counsel therein*, shows that what the court actually had in mind was the failure to recover interest *plus an inability to pay the alleged tax and bring suit immediately* constituted inadequacy of legal remedy.

Under the California system of taxation, taxes on real estate and personal property secured by real estate do not become payable until the third Monday in October (Political Code, Sec. 3746), while unsecured personal taxes are due immediately upon the "assessment" thereof. (Political Code, Sec. 3756.) In the *Birch Case*, the taxpayer owned approximately 20.16 acres of land (California Supreme Court Records, L. A. 7168, Tr. p. 8, fol. 11, hereinafter referred to by case number only), which was assessed for 1921 at $1,153,045.00. (L. A. 7168, Tr. p. 9, fol. 13.) Thereafter, the Board of Supervisors, sitting as a board of equalization, heard the taxpayer's claim and, without the statutory notice required by Political Code section 3681, raised the assessed valuation by the sum of $150,000.00. Writ of review in the Superior Court was issued on September 13, 1921. It is evident, therefore, that when the writ was issued, the petitioners could not have paid the tax in question and *therefore had no remedy at all under sections 3804 and 3819*. This was the position taken by the attorneys for respondent taxpayer upon the later appeal of the county from a judgment decreasing the assessment by the sum of $150,000.00 as is shown by reference to page 32 of respondents' reply brief (L. A. 7168), where the following appears:

> "Of course, if the taxpayer can remain in the position he was in at the time of the action of the

board and await the action of the authorities to enforce the collection of the tax by suit, it may be urged that such defense would constitute an adequate remedy. The situation here, however, is entirely different. Petitioners were faced with the proposition of having a lien placed upon their property for the amount of the tax on the increase which amounted to approximately $4500.00. *They could not pay it at the time of the action of the board nor for several months thereafter. The remedy provided for by section 3819, Political Code, was therefore not available.* Furthermore, under section 3819, *Political Code*, the petitioners would be unable to recover any interest upon the money paid to the county. *Miller v. County of Kern*, 150 Cal. 797. And this fact alone renders such remedy inadequate." (Our italics.)

In view of these facts, we submit that the decision of the California court is not of authority here in the instant case where the tax enjoined was levied upon personal property and the tax could have been paid the day the assessment was levied and suit filed for the return thereof, under section 3819, at once. Furthermore, the case has not been cited or followed in California upon the point of interest except in the decision complained of herein. That the decision is seemingly out of line with other cases in California (unless the briefs and record are read), is shown by perusal of the following decisions:

Crocker v. Scott, 149 Cal. 575, 594;

Byrne v. Drain, 127 Cal. 663, 668;

Dean v. Davis, 51 Cal. 406, 412;

Savings and Loan Society v. Austin, 46 Cal. 416, 488;

Fremont v. County of Mariposa, 11 Cal. 361, 362

Even though the *Birch Case were not distinguishable* upon the facts of our case, this court has long held that different questions arise when courts of a different sovereignty interpose in the collection of a state tax. Thus this court, in *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, at page 485, enunciates the doctrine as follows:

> "Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."

See, also:

Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 281;
Smyth v. Ames, 169 U. S. 466, 516;
Whitehead v. Shattuck, 138 U. S. 146, 152;
Payne v. Hook, 74 U. S. (7 Wall.) 425, 430.

To support their contention that inability to recover interest is enough to show inadequacy of legal remedy, counsel have only been able to cite *Procter and Gamble Distributing Co. v. Sherman*, 2 F. (2nd) 165, 166. Reference to the decision shows that it is at most only one of the grounds for holding that the New York tax refund statute (Section 218, New York Tax Law, as amended Laws 1920, c. 640, §8; Laws 1922, c. 507 §5) afforded an inadequate remedy. Like section 3804, the section uses the permissive "may," not the mandatory

"must"; and, apparently, unlike the California statute; the section had not, prior to the decision, been construed as mandatory. In this state of the law, as the court said, "the language as a whole leaves it uncertain whether the taxpayer could *compel* a refund." Therefore, the court held quite rightly that no adequate remedy at law was shown. The case, then, can hardly be cited as a square holding of the necessity of recovery of interest to constitute an adequate remedy.

Moreover, while we do not have access to either record or briefs in the case, the citation by the court of *United States v. N. Carolina*, 136 U. S. 211, 216, and *District of Columbia v. Johnson*, 165 U. S. 330, would give rise to the belief that the law of New York does not permit the recovery of interest upon a judgment against the sovereign. As we have shown above, that is not the case in California and such a judgment for refund of taxes bears interest in this state until paid.

Furthermore, although we have great respect for the legal attainments of District Judge Learned Hand, it cannot be gainsaid that his opinion in this case rests neither upon authority or reasoning. His pronouncement is made without any consideration of the relative interests of the parties to the action. On the contrary, in the well-reasoned case of *Atchison, Topeka and Santa Fe Ry. Co. v. Eldredge*, 65 Oklahoma 317, 166 Pac. 1086, the Oklahoma Supreme Court, in holding a state statute providing that the taxpayer should have an exclusive remedy by payment of the tax and suit for its refund, afforded a plain, speedy and adequate remedy, although no interest could be recovered, said at page 319 (166 Pac. 1087):

> "We think, and so hold, that the contention of the plaintiff that the act under review is unconstitutional, because it does not provide for the recovery of damages, or for attorney's fees, or compensation for use of the money, is wholly without merit. * * *"

It is noteworthy that in arriving at this decision, the Oklahoma court relied upon and quoted the following language used by this court in *Tennessee v. Sneed*, 96 U. S. 69, 75:

> "In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it [the federal government] adopts the rule prescribed by the state of Tennessee. It requires the contestant to pay the amount fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal or even harsh, in this. It is a wise and reasonable precaution for the security of government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs.
>
> "We think there is no ground for the assertion that a speedy and effective remedy is not provided to enforce the claim set up by the plaintiff."

Again, while the *Birch* and *Proctor & Gamble Cases* have never been cited or followed except in the decision complained of here, the *Eldredge Case* was expressly followed in *Bradford v. Snell*, 80 Okl. 56, 57, 193 Pac. 982, 983.

See, also, *Black v. Geissler*, 58 Okl. 335, 159 Pac. 1124, as to adequacy of the refunding statute in question, which did not authorize recovery of interest.

While this court has never expressly passed upon the effect of an inability to recover interest upon the sum paid by reason of the alleged invalid tax, as set forth above, this court has on at least three occasions passed upon refund statutes almost identical with section 3804, and in each case has held it such an adequate remedy as to preclude equitable jurisdiction, thus impliedly holding that the recovery of interest is not essential.

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 287;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485.

Shelton v. Platt, 139 U. S. 591, 600.

Without any discussion as to inclusion of interest, this court has denied injunctive relief in each of the following cases, where the statutory refund was similar to that provided for by sections 3804 and 3819 of the California Political Code, because the taxpayer had the right under state law to recover back the amount of the alleged tax.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485;

Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 687;

Arkansas Building Assn. v. Madden, 175 U. S. 269, 273;

Allen v. Pullman's Palace Car Co., 139 U. S. 658, 661;

Shelton v. Platt, 139 U. S. 591, 597;

Tennessee v. Sneed, 96 U. S. 69, 74-5;

Dows v. City of Chicago, 78 U. S. (11 Wall.), 108, 112.

The same conclusion has been reached in the following decisions by the various Circuit Courts of Appeals.

Smith v. Douglas Co. (Neb.), 254 Fed. 244 (8th Cir.);

Atchison, Topeka & Santa Fe Ry. Co. v. Board of Commissioners, 225 Fed. 978, 979 (8th Cir.);

City Council of Augusta v. Timmerman, 233 Fed. 216, 218 (4th Cir.).

The same rule has been generally laid down by the courts in states not permitting injunctive relief solely upon the ground of the invalidity of the tax as is seen by reference to the following decisions:

Duluth Log Co. v. Town of Hawthorne, 139 Wis. 170, 120 N. W. 864, 866;

Cole v. Forto, ... Tex. Civ. App ....., 155 S. W. 350, 352;

Patterson v. Pitts, 180 Ala. 100, 60 So. 390, 391;

Hall v. City of Fayetteville, ... N. C., ..., ..., 20 S. E. 373, ...

Shines ~~*Stines*~~ *v. Franklin Co.*, 48 Mo. 167, 176;

Worr v. Collector, 234 Mass. 279, 282, 125 N. E. 557, 559;

Wells Fargo & Co. v. Dayton, 11 Nev. 161, 168.

The fundamental principle underlying the many decisions holding an action for refund of taxes under state statutes similar to sections 3804 and 3819 of the California Political Code to be an adequate remedy at law, was laid down by this court as early as 1875, in the *State Railroad Tax Cases*, 92 U. S. 575, at pages 613 to 615, as follows:

"The Government of the United States has provided, both in the customs and in the internal revenue,

a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

"That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867 [14 Stat. *et al.*], that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' R. S., Sec. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice." (Citing cases.)

"In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen

whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' * * * One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative."

State Railroad Tax Cases, 92 U. S. 575, 613-15.

Nor is it necessary that the relief in the legal proceeding be identical or as convenient as that which might be had by equity. In *Arkansas Building Association v. Madden*, 175 U. S. *269*, this court said at page 274:

> "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding."

We therefore believe that it has long been decided by this court that an action at law by which the taxpayer can recover back the entire sum paid, *together with interest upon the judgment therefor until said judgment is paid*, is an adequate remedy at law which is a bar to

an exercise of equitable jurisdiction by a Federal court. Any inconvenience, or slight pecuniary loss arising from the inability to collect interest on the money paid as a tax from the date of payment of the tax to the date of judgment ordering the return thereof, even though the remedy here afforded had not been passed upon on so many occasions by this court as to render the matter *stare decisis*, is outbalanced, in the absence of allegations of unusual hardship to the taxpayer, which are not presented here, by the necessity of keeping intact the fiscal machinery of our various states and subordinate governmental agencies. This balance of interest is particularly strong in favor of the tax collecting agency when the equitable proceeding is brought in the courts of another sovereign which are forbidden by its statutes from interfering in any way by injunction with its own taxes.

United States Code, Title 26, Section 154.

E. The Bill of Complaint Fails to Show Grounds for Equitable Relief Since the Plaintiff Is Neither the Owner nor Person Primarily Responsible for the Tax Complained Of.

Paragraph VII of the bill of complaint plainly sets forth that the "talking sets" in question are owned by the American Telephone and Telegraph Company. [R. 7.] The tax in question was levied upon the American Telephone and Telegraph Company, not upon respondents or either of them. [R. 7-11.] In other words, respondents here are asking for injunctive relief against a tax upon property of another and for which they were not, so far as anything appears in the record, liable in any way. Under such conditions, we submit that even though the

bill of complaint alleged a federal question and one which would ordinarily result in a federal court assuming equitable jurisdiction, yet, because of the improper party plaintiff, no grounds of equitable jurisdiction are shown by the bill of complaint.

This was long ago held by this court in *Northern Pacific Railroad Co. v. Patterson*, 154 U. S. 130. This was a writ of error to the Supreme Court of Montana reviewing a judgment of that court affirming a judgment of the lower court for the defendant in a suit to enjoin the collection of taxes upon certain lands claimed by the plaintiff railroad to be exempt from state taxation by reason of federal ownership. The railroad claimed an interest therein by virtue of an act of July 2, 1864, entitled "An Act Granting Lands to Aid in Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast on the Northern Route." In dismissing the writ, this court said at page 134:

> "The plaintiff, however, in no respect represented the United States, and an injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not."

It is therefore our belief that since an adequate and certain remedy at law, under a state statute similar to others long ago passed upon with approval by this court, by which these respondents or the American Telephone and Telegraph Company can recover back in a single action the entire amount of the tax paid, including any penalties that may have accrued, no ground for equitable relief is shown by the allegations of the bill of complaint,

assuming, without admitting, that a federal question is raised thereby. The lack of equitable jurisdiction is made absolutely apparent, moreover, by the fact that the only ground for equitable relief is one which does not affect these respondents, so far as the record discloses, and which this court has long ago held could be raised only by the person who would suffer by the alleged unconstitutional tax.

We therefore respectfully submit that the decision of the Circuit Court of Appeals was erroneous in holding such jurisdiction was present, and that this court should reverse the decision of the court below and remand the case to the District Court with instructions to dismiss for lack of equitable as well as federal jurisdiction.

III.

INASMUCH AS THE "TALKING SETS" WERE NOT IN FACT TAXED THROUGH THE GROSS RECEIPTS OF RESPONDENTS, NO VIOLATION OF THE FOURTEENTH AMENDMENT IS SHOWN.

Previously in this brief we have considered the *allegations* contained in the bill of complaint. While it is true that the Circuit Court of Appeals did not pass upon the substantive constitutional question presented by this case except in a most cursory manner as the court based its decision almost entirely upon an interpretation of article XIII, section 14, of the California Constitution [R. 93; see also Respondents' Brief, p. 16], since the decree of the Circuit Court of Appeals ordered the District Court to issue its injunction as prayed for [R. 94-95], the case comes before this court upon the merits as well as the

pleadings. It is our contention that no violation of the fourteenth amendment is in fact, or can be, shown in the instant case.

Under point I, herein, we have pointed out that the gist of respondents' entire case is to be found not in a charge of over-valuation or improper assessment of the "talking sets" *per se*, but upon the theory that the "talking sets" are taxed, by virtue of the tax complained of herein, once in the hands of the American Telephone and Telegraph Co. and again in the hands of these respondents through their gross receipts tax. While we have shown above that *even admitting such to be the fact*, no violation of the fourteenth amendment would be shown, we now propose to show that in truth the "talking sets" were assessed *only once* and at a figure much below their real value which is greatly enhanced beyond the apparent worth of the "talking sets" by the tremendous earnings received by the American Telephone and Telegraph Company from their common use with the plant and equipment of respondents.

A. The History and Subsequent Legislative and Judicial Interpretation of the Gross Receipts Tax in California Show It to Be a Substituted Tax Upon Property Owned by the Public Utilities and Does Not Include Property Leased to Them.

Under point V, A, hereof, we have traced the history of article XIII, section 14 of the California Constitution from its inception in the minds of the members of the Commission on Taxation and Revenue of 1906 as represented by their report of that year, through the reports of the 1910 Commission, the arguments of Senator Curtin

addressed to the voters at the polls in 1910, at which the people of California adopted the proposed constitutional amendment No. 1, the subsequent report of the State Board of Equalization and, finally, the decisions of the California State Supreme Court. These, we believe, show that the method by which the gross receipts tax rate was first fixed was to determine, through a capitalization of the net earnings of the various public utilities to be taxed by the new method, the correct amount of tax which these corporations would pay, if taxed upon the property owned by them at the same rate as private property was taxed generally throughout the state. The amount was thereafter spread over the gross earnings and resulted in the initial rate placed upon public utility gross receipts under article XIII, section 14.

Historically, the gross receipts tax is undoubtedly a "substituted" tax upon the property owned by the public utilities. Therefore no double taxation or violation of the fourteenth amendment can be shown from the standpoint of the history of the constitutional provision.

As set forth below (V, B), this historical intent was clearly and gramatically expressed in the language of article XIII, section 14 of the California Constitution. No double taxation can be predicated in the instant case upon the language of the constitutional provision involved.

Finally, the courts of California on numerous occasions have clearly enunciated the rule that, insofar as the state courts are concerned, the gross receipts tax provided by article XIII, section 14 of the California Constitution is a "substituted property tax" on the property owned by the public utilities. Such an interpretation of the state

courts is most persuasive on this court as to whether a violation of the fourteenth amendment is or is not presented.

Thus in *Swiss Oil Corp. v. Shanks*, 273 U. S. 407, 13 47 S. Ct. 393, this court had before it a writ of error to the Kentucky Court of Appeals to review its judgment reversing judgment in the court below for plaintiff in a mandamus proceeding to compel the refund of a gross receipts tax levied at the rate of one percentum on the gross receipts of plaintiff from its business of "producing crude petroleum oil." It was contended (p. 394) among other grounds, that since the corporation also paid an *ad valorum* tax upon all of its property, the tax in question constituted double taxation contrary to the "equal protection of the laws" clause of the fourteenth amendment. After referring to the fact that the Kentucky courts had previously held the tax in question a license tax and not a substituted property tax, this court said at page 394:

> "As the case is brought here from a state court, the construction put by the court below upon the statutes and Constitution of its own state is not open to review here."

See, also:

Texas Co. v. Brown, 258 U. S. 466, 481, 563;
Brown-Forman Co. v. Kentucky, 217 U. S. 572.

We submit, therefore, that the determination that the gross receipts tax is a property tax upon the owned property of the utilities, as shown by the history of article XIII, section 14 and the decisions of the California state courts, is sufficient to show that no double taxation is

presented by the instant case and therefore no violation of respondents' rights under the fourteenth amendment.

B. Inasmuch as the Gross Receipts of Respondents Are Largely the Result of Arbitrary Service Rates so Fixed by the California Railroad Commission as to Allow a Fair Return Upon the Property Owned by Respondents, Excluding All Leased Property, the "Talking Sets" Leased to Respondents Could Not Be Taxed by the Gross Receipts Tax Levied Upon Respondents.

We believe, however, that it is possible to demonstrate with almost mathematical precision that no double taxation of the "talking sets" is presented here because of the manner in which respondents' gross receipts are actually computed. As we have pointed out above, the California courts have held that the gross receipts tax is a property tax, not a license tax.

Pullman Co. v. Richardson, 185 Cal. 484, 487;

Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 430.

See also Respondents' Brief, page 17.

If the gross receipts which are taxed under the provisions of article XIII, section 14 of the California Constitution reflect only property *owned* by the respondents here, it is mathematically demonstrated that the "talking sets" leased to respondents here are not taxed by the gross earnings tax and therefore when taxed by your petitioner county were simply treated as all other property not taxed through the gross receipts tax. (See, *infra*, V. A, 1.)

1. The Gross Receipts of Respondents Taxed Under the Provisions of Article XIII, Section 14, of the California Constitution, Are Almost Entirely the Result of Arbitrary Service Rates Established by the California Railroad Commission to Give a Fair Return Upon Their Investment or Rate Base.

We must therefore consider the method by which the gross receipts of a California public utility, and particularly of respondents, Pacific Telephone and Telegraph Co., and Southern California Telephone Co. are determined.

These corporations, as public utilities, are subject to the jurisdiction of the California Railroad Commission.

California Constitution, Article XII, Section 23;

California Public Utilities Act, California Statutes 1915, p. 115; Deering's General Laws, Act 6386.

Their gross operative receipts, excluding non-operative revenues as required by section 3665a of the Political Code, are made up of receipts from exchange lines, the revenue derived from toll service and miscellaneous items.*

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*These were estimated for the year 1924 by the Railroad Commission *In re Southern California Telephone Co.*, 25 R. C. D. 721, 742, to be:

Exchange revenue	$11,655,000.00	91.5%
Toll revenue	660,000.00	5.0%
Miscellaneous revenue	482,000.00	3.5%
	$12,797,000.00	

The Pacific Telephone & Telegraph Co., in addition to owning the Southern California Telephone Co., operates long distance

It is evident, therefore, that 91.5% of the gross operating receipts are the result of exchange rates. (See Footnote.) These exchange rates are established by and are under the control of the California Railroad Commission.

Public Utilities Act, California Statutes 1915, page 115, as amended, Sec. 32, b; Deering's General Laws 1923, Act 6386, Sec. 32, b.

California Constitution, Article IV, Section 33.

The toll rates in so far as they are intrastate, are set by the California Railroad Commisison, and in so far as they are interstate, by the Interstate Commerce Commission. Therefore, the great proportion of the gross receipts of the Southern California Telephone Co. are the product of individual exchange rates or toll rates as set by the Railroad Commission and the number of services maintained by it.

Although these exchange rates are in fact very numerous, depending upon the character of service rendered, assuming for the sake of simplicity, a single flat service or exchange rate, we have then a mathematical equation, as follows:

"R × No. of Services = gross receipts."

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lines throughout California and local exchanges in certain smaller cities. Due to the extended character of its service, its rate base and revenues have not been investigated in the same comprehensive way as the Southern California Telephone Co. However, inasmuch as the great majority of the telephone instruments taxed in this case were used in the operations of the Southern California Telephone Co., and the principles are the same in both cases, we will use for illustrative purposes only figures based upon the situation of the Southern California Telephone Co."

Analyzing "R", we find that it is a more or less arbitrary factor intended by the Railroad Commission to produce when multiplied by the estimated number of services such a sum as gross receipts as will permit the public utility, after deduction of its expenses, to earn a fair rate of interest upon the property invested by the utility and used for operating expenses, known as the rate base. The intention of the Commission, therefore, is simply to establish a rate (actually a series of rates), which, when multiplied by the estimated number of services, will give a fair return upon this investment or rate base. Again, expressed mathematically, the formula is:

$$\text{"R} = \frac{\text{X \% } \times \text{ rate base}) \div \text{operating expense}}{\text{Estimated No. of services."}}$$

2. The Rate Base of Respondents, as Established by the California Railroad Commission, Includes Only Property Owned by Respondents and Does Not Include the "Talking Sets."

What then is considered by the California Railroad Commission as the rate base of a public utility, or for illustrative purposes, of the Southern California Telephone Company? Investigation shows that the Railroad Commission has always limited this rate base to the value of the property *used* and *owned* by the utilities, and has at all times disregarded leased property in formulating the rate base. Rentals for the use of leased property have been considered an operating expense of the utility. Thus in the case of the Southern California Telephone Co., under the 1924 rate decision, the rent deductions included as expenses amounted to the sum of $99,000.00

annually. *(In re Southern California Telephone Company*, 25 R. C. D. 721, 752, Table No. 7.)

Nor have the "talking sets" in question been any exception to this general rule. The "talking sets" are leased by the American Telephone & Telegraph Co. to the various component parts of the Bell system upon what is known as the American Telephone & Telegraph Co. license agreement, by which the parent company reserves 4½% of the gross revenue derived from the use of the instruments reckoned upon the proportion of the leased instruments to the total number of instruments operated by the local corporation. In *City of San Jose v. Pacific Telephone & Telegraph Co.*, 3 R. C. D. 720, the California Railroad Commission, in establishing the rates for the San Jose exchange area, an exchange operated by respondent Pacific Telephone & Telegraph Co., investigated the valuation of the property invested by the Pacific Telephone & Telegraph Co. in that area and established the sum of $823,995 as the rate base for the San Jose area. It then discussed various items which were disputed between the Commission and the Telephone Company. In so doing it adverted to the license agreement for the use of the "talking sets" of the San Jose area. At pages 732 to 733, the Commission said:

> "I have no hesitancy in saying that any contract such as the one here in question should always be scrutinized with the utmost care. * * this company is absolutely under the control through stock ownership of the American Telephone and Telegraph Company. Contracts such as this are not made between parties equally competent to contract and they in many cases are mere devices for diverting excessive dividends from earnings. Here the parent com-

pany which controls entirely the destinies of this company, takes a 4½ per cent slice off the top of the gross revenue of this company before anybody else gets a chance at such revenue. *The Pacific Company, defendant herein, urges that this is an actual expenditure and that as such must be allowed.* Of course this is not an accurate statement of the law. Excessive, unreasonable or improvident expenditures though actually made may be disallowed by commissions and courts in rate-fixing inquiries. • • •

"For the exchange here in question there was paid $10,121.89 to the American Telephone and Telegraph Company during the year last past, this being at the rate of 4½ per cent of the gross revenue. From the investigation made by the auditor of this Commission and submitted in evidence the only service rendered during this year for the exchange in question was the use of exchange station instruments numbering 1,468, which are valued by the companies themselves at $2.92 each, which would represent a total valuation of $21,806.56. The American Telephone and Telegraph Company contends for a rental value of 24 per cent, which includes depreciation, repairs, upkeep, interest, etc. This would allow this company $5,233.57, assuming this 24 per cent earning not to be excessive which I am not prepared to admit, which would mean a reduction of $4,888.32 on the 24 per cent basis of earning, and I believe if anything this exceeds the maximum which this company should be allowed to impose as a charge upon its patrons in San Jose, and in passing from this branch of the inquiry I can not refrain from saying that while my inclination is always to impute property motives to persons and corporations, still these intercorporate relationships with their attendant possibilities for fraud never have appealed to me, and I would most respectfully suggest to the utilities in-

volved that open, fair, arms-length dealings would be better not only for the public but for the utility in the end." (Our italics.)

And at page 736, the Commission stated its method of treatment of the license payments to the American Telephone and Telegraph Company as follows:

"Assuming that the cost of reproduction of property as modified by resort to actual cost, where such cost may be determined, less * * * depreciation * * *, is a proper basis upon which to fix rates, * * *, we would have a figure of $826,-254.16 as representing the property of this company located within the exchange area. From actual computations based upon the rates which are established in the order there will be * * * a net return of $50,185.80, * * * which is a little more than 6 per cent on such value. * * * I have taken 2½ per cent instead of 4½ per cent as the proper amount to be charged for the services rendered by the parent Bell Company, and this would add $4,888.32 to the net revenue, making a total addition to the net revenue from these two sources (reduction also made in depreciation allowance) of $8,242.51 which would make a total of $58,428.31. Again, assuming $826,-254.16 to be the value of this property, this corrected net earning would result in a net earning of 7.07 per cent."

The "talking set" situation was again covered by the 1924 rate decision of the California Railroad Commission by which the rate base and rates for the Los Angeles city exchange area was set for the Southern California Telephone Co., reported in 25 R. C. D. 721, at pages 744-747, as follows:

"Southern California Telephone Company is sub-licensee under The Pacific Telephone and Telegraph Company licensee contract with the American Telephone and Telegraph Company, the parent concern. Under this license contract, applicant pays to the American Company through Pacific Company 4½ per cent on that portion of its gross revenue, less uncollectible bills, determined in proportion to the ratio of Bell-owned instruments on its system to the total number of instruments in service thereon. The payment for 1923 was $385,438.44. The company estimated that for 1924 this payment under present rates would be $500,000 and had the rates which it proposed been effective for the entire year 1924, this payment would be approximately $709,000. The reasonableness of this payment was the subject of considerable inquiry in connection with this proceeding.

"Evidence as to value was presented by applicant and certain evidence as to cost by the city of Los Angeles. Applicant claims that it receives from the American Company, under this agreement, the following benefits and services:

"(1) Use of telephone transmitters receivers, and induction coils, including repair and replacement thereon. • • •

"One hundred per cent (100%) of the stock of the Southern California Telephone Company is owned by The Pacific Telephone and Telegraph Company. The American Telephone and Telegraph Company owns 78 per cent of the stock of the Pacific Company. Applicant is operated practically as a 'district' of the Pacific Company. The same attorneys and engineers represent both utilities and the evidence indicates that it is difficult for them to determine when they are working for one concern and when for the other. Men are shifted from one com-

pany to the other as a company shifts its men from district to district. The Pacific Company, in turn, operates for all intents and purposes, except as to separate legal entity, as a division of the parent concern, the American Telephone and Telegraph Company.

Under the licensee agreement the American Company leases to the local companies telephone transmitters, receivers and induction coils, these being parts of the telephone instruments required. *This, in itself, relieves the local company of certain investment, and in addition, certain operating expenses. A reasonable rental for these should be allowed.* The remaining services rendered by the American Company are comparable, to a large extent, with the administrative services, including financing, engineering, research, development and supervision of the head office of any large utility." (Our italics.)

It is to be noted that at page 752, table 7, the Commission estimated that the licensee revenue under the heading of operating expenses would be, for 1924, the sum of $400,000.

It is true that nowhere in the 1924 rate decision for the Southern California Telephone Co., nor in the San Jose rate decision for the Pacific Telephone & Telegraph Co., nor elsewhere in the reports of the Railroad Commission, can we turn to an express pronouncement upon the elementary proposition that such leased property should not be included in the rate base. However, in the case of *In re Marysville Water Co.*, 19 R. C. D. 452, 455, the company attempted to include in its capital investment, or rate base, the estimated value of its office buildings and also include in its operating expenses the sum of

$12,000 per year as rental for the offices. The Railroad Commission held this to be a duplication and ordered the elimination of the rentals from its operating expenses.

Therefore, the inclusion of the sum of $400,000 as operating expenses as a result of the license agreement for the use of the "talking sets" in question by the Southern California Telephone Co. for the year 1924, can only mean that the "talking sets" themselves were not included in the rate base of the Southern California Telephone Co. Nor do we believe that counsel for respondents will attempt to controvert this very elementary principle of rate making.

3. Inasmuch as the "Talking Sets" Were Not Included in the Rate Base of Respondents and Therefore Did Not Affect Their Gross Receipts or Gross Receipts Tax, No Double Taxation or Discrimination Arises When the "Talking Sets" Were Taxed Under the General Provisions of California Law to the Owners Thereof.

In the decision above referred to (25 R. C. D. 721), the Commission stated at page 756:

> "The rates herein found reasonable would result, applied on the 1924 basis herein used, in an estimated *return of 6.5% on the rate base.*" (Our italics.)

The rate base for the Southern California Telephone Co. for 1924 as determined in the aforesaid decision of the Railroad Commission (25 R. C. D. 721) at page 734, table 4, was $58,681,453. Assuming the return was as that estimated by the Commission, 6.5%, on this rate base, the maximum net revenue permitted, and to achieve

which the service rates were increased at that time by the Railroad Commission, was $3,814,294. If we assume that the reasonable market value of the "talking sets" owned by the American Telephone & Telegraph Co. and leased to respondents in the instant case (figuring the assessed valuation of $713,665 as 40% of their market value in accordance with the general practice in the County of Los Angeles), was $1,748,160 and that this sum was added to this rate base by virtue of ownership by the Southern California Telephone Co., the rate base would then have been $60,429,613, and the reasonable return thereon which the Commission would be obligated to permit to be allowed (through increased service rates) would now be $3,927,924. If the rates were necessarily increased to permit of the same net return upon the increased rate base, it is self-evident that the gross receipts of the telephone company would also increase and likewise the gross receipts tax to the state.

It is, therefore, evident that by applying the simple axiom of rate fixing that the gross receipts of a public utility must be permitted by public utility commissions to increase in proportion to the amount of property invested by the utility, or its rate base, it is mathematically demonstrated that a *tax on such gross receipts is of necessity a property tax only upon the property included in the rate base.* The exclusion therefrom of leased property and particularly of the "talking sets" in question, renders it impossible, under the present rate making policy of California for the state to have received any taxes through the gross receipts tax of respondents, from the "talking sets" which were not *owned* by respondents and therefore not included in their respective rate base.

We submit, therefore, that instead of an instance of double taxation and discrimination against these respondents being presented to this court in the instant case, unless the "talking sets" are taxed locally, property of a market value of nearly two millions and admittedly earning for its owner in excess of $40,000 annually would go entirely untaxed.

The "talking sets", therefore, were not taxed through the gross receipts tax of respondents, either when the gross receipts tax considered from the viewpoint of the history of article XIII, section 14 of the California Constitution, its language and judicial interpretation thereof, or from the mechanical and practical effect of the tax as it is levied upon the receipts of these very respondents. Since the gross receipts can represent from either view only the property *owned* by the respondents, it is apparent that no question of double taxation or discrimination against the respondents is actually before this court. We submit, therefore, that this court should, if it finds that federal and equitable jurisdiction are presented to it, hold that no *facts* constituting double taxation or discrimination against respondents contrary to the provisions of the fourteenth amendment, or at all, are presented to the court in the instant case.

IV.

ASSUMING, WITHOUT ADMITTING, THAT FEDERAL AND EQUITABLE JURISDICTION IS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT, INASMUCH AS DOUBLE TAXATION AND DISCRIMINATION WERE NOT IN FACT SHOWN, THE CIRCUIT COURT OF APPEALS ERRED IN PASSING UPON A QUESTION OF THE INTERPRETATION OF A STATE CONSTITUTION.

The Circuit Court of Appeals in the decision complained of herein rested its decision squarely upon an interpretation of state law as presented in article XIII, section 14 of the California Constitution prior to its construction, in this regard, by the state courts. [R. 78-85; see also Respondents' Brief, p. 9.] Respondents in their brief in opposition to our petition for writ of *certiorari* argued (Respondents' Brief, p. 4) that inasmuch as the complaint alleged in good faith a federal question, the Circuit Court of Appeals had jurisdiction to pass upon all questions of state law involved therein.

It is our contention that assuming, without admitting, that the allegations of the bill of complaint stated grounds for both equitable and federal jurisdiction, *still that jurisdiction did not authorize the Circuit Court of Appeals to pass upon a matter solely of state law unless the determination thereof was imperatively necessary to the decision on the federal question involved.* As set forth under point I hereof, the gist of the bill of complaint was that if the tax on the "talking sets" were collected, the same property would be doubly taxed and re-

spondents discriminated against. Whether the California Constitution and statutes authorized the tax in question was immaterial and unquestionably not "imperatively necessary" to the decision of the federal question, *unless there was in fact a case of double taxation.*

The Circuit Court of Appeals did not go into the situation at all except to *assume*, as alleged in the bill of complaint, the existence of the double taxation and discrimination complained of [R. 85-88] *until after it had passed upon the question of state law.* [R. 77-85.] As we have seen in point III hereof, it can be demonstrated with almost mathematical certainty that no double taxation or discrimination is presented in the instant case. In failing to pass upon and determine this question of fact, and in assuming to be the fact what was not the case, the Circuit Court of Appeals erred not only in so failing but, also, because it held as a result that the determination of the question of state law was necessary to its determination of the federal point. [R. 86.]

It must be understood that our position is not that the Circuit Court of Appeals should first pass upon and decide favorably to respondents the substantive constitutional question presented. We do not so argue. As we have said under point I hereof, jurisdiction and the power to decide one question of law can not be predicated upon the decision on the merits of another. If such a substantive question had in fact been presented to the Circuit Court of Appeals, we submit that its decision upon the validity of the tax under the provisions of the state Constitution rather than upon the unconstitutionality of the state constitutional provision under the fourteenth amendment was perfectly proper.

However, we do contend that the power of a federal court to pass upon and decide, prior to decisions by the state courts, the construction of a state constitutional provision depends not upon the *allegations* as to a federal question contained in the bill of complaint but upon the *facts* of the case itself, when the allegations of the pleading are controverted.

In the instant case, your petitioner not only moved for dismissal of the bill of complaint [R. 30-32] upon grounds which constituted it in effect a demurrer to the bill; but also filed an answer. [R. 24-29.] Paragraph VIII of the latter [R. 26] contains the following allegation:

"Deny that the taxes paid by plaintiffs or either of them for state purposes *covered* the 'talking sets,' or any of them.

"Deny that any taxes have been paid upon said 'talking sets' for the year 1925 as required by law or at all, and deny that any taxes paid by these plaintiffs or either of them to the state of California, *covered* the said 'talking sets' or had the effect of exempting them from liability for the taxes levied thereon by the County of Los Angeles." (Our italics.)

Therefore the facts of discrimination and double taxation, *as facts*, and not only the legal and constitutional consequences flowing therefrom, were at issue before the District Court. It is true that petitioner did not at the oral hearing introduce any evidence to show that no double taxation or discrimination were presented; but neither did respondents, except as to the facts of a return on the *operative property of the utilities* [R. 42-49], which, as we will show below, was outside of the issues of the case (see *infra*, V) and the burden was upon them as moving parties. It is significant that the stipulation

entered into between counsel [R. 47-48] carefully admits only the allegations in so far as they were facts "of the amendment to plaintiffs' complaint," which simply contained allegations as to the various municipalities on behalf of which petitioner county had in part attempted to collect the tax in question.

It is true that the decision [R. 50-51] and decree [R. 53-55] of the District Court were based upon the motion to dismiss; but the decision of the Circuit Court of Appeals [R. 93] and decree based thereon [R. 94-95] remanding the case to the District Court "with directions to proceed with the case and *to grant the injunction as prayed for by plaintiff*" constituted a decision on the merits.

It is our contention, therefore, that to thus decide the case on the merits *upon an assumed state of facts contrary to the actual situation* and solely upon a construction of article XIII, section 14 of the California Constitution was not only contrary to the rule that federal courts will not pass upon questions of state law unless "imperatively necessary" to the decision but also of the further rule that federal courts are particularly loath to interfere in matters of state law involving questions of state revenue.

A. The Decision of the Circuit Court of Appeals Was in Violation of the Rule That Federal Courts Will Not Declare an Administrative Act to Be Violative of the Provisions of a State Constitution Unless Such a Holding Is Imperatively Necessary.

It has long been the rule of this court that when both questions arising under the Federal Constitution and

the State Constitution are presented to it for decision prior to determination by the state courts of the question of state law, this court will not pass upon the question of state law unless its determination is "imperatively" necessary to the determination of the federal question. Thus as long ago as the decision of this court in *Pelton v. National Bank*, 101 U. S. 143, in which this court had before it an appeal from the Circuit Court for the Northern District of Ohio from a decree enjoining a county treasurer from collecting a tax alleged to be illegal upon both state and federal grounds, this court said at page 144:

> "The chief ground of objection to the tax set out in the bill, and that which is mainly relied on in argument here, is, that the Act of the Ohio Legislature of April 12, 1877, entitled 'An Act for the equalization of bank shares for taxation', under which the tax complained of was finally assessed, is in conflict with the Constitution of Ohio * * *.
>
> "It is also distinctly alleged that the tax, as assessed, * * * is in conflict with sec. 5219 of the Revised Statutes of the United States * * *.
>
> "It is an appropriate duty, which this court is called upon to perform very often, to protect rights founded on the Constitution, laws and treaties of the United States, when those rights are invaded by State authority. But it is a very different thing for this court to declare that an act of a State legislature, passed with the usual forms necessary to its validity, is void because that legislature has violated the Constitution of the State.
>
> "It has long been recognized in this court that the highest court of the State is the one to which such a question properly belongs; and though the courts of

the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the state court, *it would be indelicate to make such a decision in advance of the State courts, unless the case imperatively demanded it. We will, therefore, inquire first whether the decree of the Circuit Court can be sustained on the other ground.*" (Our italics.)

Again in *Michigan Central Railroad Co. v. Powers*, 201 U. S. 245, in affirming a decree of the District Court dismissing a bill to restrain the enforcement of the provisions of a state law for assessment and collection of taxes upon railroad property, this court said at page 291:

"The unconstitutionality of a statute may depend upon its conflict with the constitution of the State or with that of the United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the State is the final authority (citing cases); while, in the other case, the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the Federal court and by this suit, and conflict with both constitutions is alleged. Undoubtedly a Federal court has the jurisdiction, and, when the question is properly presented it may often become its duty to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination. *At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the*

state constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the State, and therefore of general public interest. (Citation.) *And this reluctance becomes more imperative when the statute has been before the highest court of the State, and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined.*"

In *Louisville and Nashville Railroad Co. v. Garrett,* 231 U. S. 298, this court had before it an appeal from an order denying a motion for an interlocutory injunction sought to restrain the enforcement of two orders of a state railroad commission upon the ground it was violation of plaintiff's rights under both the federal and state Constitutions. In affirming the order of the court below, this court said at pages 304-5:

> "It is objected that the act of March 10, 1900, violates sections 27, 28, 109 and 135 of the state Constitution • • •.
>
> 'So far as we are advised, the court of appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a state statute to be in conflict with the Constitution of the state before that question has been considered by the state tribunals—to which it properly belongs—unless the case imperatively demands such a decision. (Citing cases.) Here, the argument against the statute is not of that compelling character."

Again in *Pullman Co. v. Knott,* 235 U. S. 23, this court had before it an appeal from the District Court to review

a decree denying injunctive relief against the collection of a tax upon the gross receipts of sleeping and parlor car companies. In affirming the decree this court, *after disposing of the federal question*, said at pages 26-7:

> "We do not feel called upon to discuss the objections under the Constitution of the state at length. Starting with the conceded proposition that the tax to be valid, must be either *ad valorem* or a license tax, the appellant argues that this cannot be a license tax, as was held by the judges who refused the injunction, because the payment of it is not made a condition of the right to do business; because another tax is imposed in terms for a license; and because the history of the law shows that for years it took the place of a property tax. These considerations undoubtedly are very strong. But as we are dealing with the validity of the law under the state Constitution, a matter that must be decided finally by the state court, and as the state court has held other gross earning taxes to be license taxes (Afro-American Industrial & Benefit Asso. v. Florida, 61 Fla. 85, 89, 54 So. 383), we are of opinion that if this act is to be overthrown, it should not be overthrown by us."

See, also:

Missouri v. Illinois, 200 U. S. 519, 522; 1196

Coulter v. Louisville and Nashville Railroad Co., 196 U. S. 599, 609;

Cummings v. National Bank, 101 U. S. 153, 156;

Royal Mineral Association v. Lord, 13 Fed. (2nd) 227, 232;

Affd., *Lake Superior Consolidated Iron Mines v. Lord*, 271 U. S. 577;

Butcher v. Maybury, 8 Fed. (2nd) 155, 160.

In *Cook Brewing Co. v. Garber*, 168 Fed. 942, the court, after summarizing the cases above referred to, stated its views as follows, at page 947:

> "The rule to be extracted from the decisions as to injunctions which interfere with the execution of state laws passed for the protection of the morals and peace of the state, *especially where the issue is not as to the power of the state to pass the law, but only whether it has been passed in conformity to the state Constitution*, is that the federal court should refrain from passing upon the statute in advance of a decision by the highest court of the state, except in very extreme cases, where the nature of the right sought to be vindicated before the federal court imperatively demands its intervention in advance." (Our italics.)

The present Chief Justice, when a circuit judge, touched upon the difficulties arising even from the cases where the federal courts were compelled to construe the state law in advance of decision by the state courts in *Western Union Telegraph Co. v. Poe*, 64 Fed. 9, 11, as follows:

> "In passing upon the question originally, this court expressed its embarrassment and hesitation in pronouncing a state law to be invalid because in violation of the state constitution, in advance of a decision by the supreme court of the state. It was fully conceded in that opinion that the supreme court of Ohio was the ultimate tribunal to decide the validity of the state law under the state constitution. This was emphatically laid down by the supreme court of the United States in *Pelton v. Bank*, 101 U. S. 143, 144. The supreme court of the state has now decided that the Nichols law is constitutional. The case before the court, though the court has overruled a demurrer to the bill, on the ground that the Nichols law is in-

valid, is nevertheless still pending in court, and no final decree has been entered therein. It seems to me manifest that it is the duty of this court to reverse its former ruling, and make it harmonize with that of the tribunal which has ultimate authority on the subject."

See, also:

Wind River Lumber Co. v. Frankfort M. A. & P. G. Insurance Co., 196 Fed. 340, 343 (Circuit Court of Appeals);

Des Moines Water Co. v. City of Des Moines, 194 Fed. 557, 558.

Such an "imperative" necessity does not, we submit, exist when the sole question of fact, upon which any claim to a substantial ground of unconstitutionality must rest, is controverted by the pleadings before the court unless it inquires into and finds that facts which might raise such a question do actually exist. As we have shown above, the Circuit Court of Appeals did not so find or determine and such facts were not, as pointed out under point III hereof, presented in the instant case.

Nor are the cases cited by respondents (Respondents' Brief p. 9) in any way opposed to our position in this regard. Thus in *Bohler v. Callaway*, 267 U. S. 479, the sole question presented was the validity under both state and federal constitutions of certain assessments levied upon the estate of decedent. As said by the court (p. 49): "There were no defensive pleadings." In other words, there was no question as to the discrimination or hardship, *in fact*, only as to the legal and constitutional consequences flowing therefrom.

In *Chicago Great Western Railway Co. v. Kendall*, 266 U. S. 94, the gist of the case was the discrimination between the assessment of farm lands at 61% of their cash value which "was agreed between the parties" (p. 100), and the assessment of plaintiffs' land at 115% and 75% respectively, as shown by evidence presented to the Circuit Court (pages 95-6). *The fact* of discrimination was therefore presented to this court, yet even in that case this court said at page 101:

> "This court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the States, and precluding temporary federal judicial interference with it save in clear cases. The present cases are not of that character."

In [redacted] *Public Service Commission v. Morgan's, etc., Steamship Co.*, 264 U. S. 393, this court had before it an appeal from a decree of the District Court enjoining the enforcement of an order of the Public Service Commission requiring the repairing of a viaduct. The requirements of the order were claimed to result in a taking of the appellant's property without due process of law. There was no question as to what facts resulted from the order itself (pp. 394-5).

Davis v. Wallace, 257 U. S. 478, was a suit by the director general of railroads and five railroads to enjoin the collection of a special excise tax assessed against each of the companies for 1918 and 1919 under a North Dakota statute. The bill alleged that the tax was invalid under the provisions of the North Dakota statute and that it was unconstitutional under the Federal Constitution as an interference with interstate commerce and in

violation of the fourteenth amendment. The bill was heard upon the merits in the court below (p. 482), and although no recital of evidence is set forth in the opinion of the court, apparently the effect of the tax as a fact was gone into at the hearing before the District Court.

In *Greene v. Louisville etc. Railroad Co.*, 244 U. S. 499, this court had before it two appeals from the District Court to review decrees enjoining state officers from attempting to enforce certain state and local franchise taxes upon the ground of discrimination in valuation contrary to the provisions of the fourteenth amendment. In commenting upon the manner in which the case came before this court, this court said at page 503:

> "In each case there was a motion to dismiss, equivalent to a general demurrer to the bill, upon the following grounds: (1) that there was no Federal question involved, and therefore the court was without jurisdiction; (2) that the bills stated no cause of action under the laws of the State or of the United States; (3) that the plaintiffs had an adequate remedy at law; (4) that the bills showed no equity on their face; and (5) that the suits were suits against the state of Kentucky. After a hearing, the court overruled these motions, defendants declined to plead further and made no objection to the submission of the cases for final decrees, the *allegations of the bills, not being denied, were taken as true,* * * *." (Our italics.)

In *Camp v. Boyd*, 229 U. S. 530, Mr. Justice Pitney, speaking for the court at page 531, stated the manner in which the question came before this court, as follows:

> "This is an appeal from a decree of the court of appeals of the District of Columbia affirming a

decree of the Supreme Court, establishing the title of the complainants (now appellees) to a lot of land in the city of Washington, and granting a perpetual injunction against the further prosecution of an action of ejectment that was brought by the appellant, Joseph Parker Camp, against Caleb C. Willard, the devisor of the complainants, to recover possession; and also enjoining Camp and all persons claiming under him from instituting any further proceedings at law or in equity for the possession of, or for asserting any claim to, the land. *The cause was heard in the Supreme Court upon a demurrer to the bill of complaint, which was overruled* (37 Wash. L. Rep. 14); *and the defendant having elected to stand upon his demurrer, a final decree followed as of course.*" (Our italics.)

Siler v. Louisville and Nashville Railroad Co., 213 U. S. 175, was an appeal from the Circuit Court of the United States, the Eastern District of Kentucky, to review a decree enjoining the enforcement of an order of the Kentucky Railroad Commission fixing maximum railroad rates. (See statement of facts, p. 176.) The bill alleged that the effect of the rate order would be to take the property of plaintiff without due process of law and would deny to it "the equal protection of the laws." There was no question raised as to what facts were involved in the order of the railroad commission.

Ex parte Young, 209 U. S. 123, came before this court on an original application for leave to file a petition for writ of habeas corpus to release the petitioner from custody to which he had been committed by the Circuit Court for the District of Minnesota for an alleged contempt in disobeying an order enjoining him from instituting certain

criminal proceedings under a state statute and for a writ of certiorari to test the validity of the proceedings. (See statement of facts, page 126.) The petitioner had been adjudged in contempt by virtue of his refusal to comply with an order from the Circuit Court to dismiss mandamus proceedings brought by him in the name of the state to compel compliance with orders of the State Railroad Commission which were alleged in injunction proceedings brought in the federal court by stockholders of the corporations against the said attorney general to be unjust, unreasonable and confiscatory. In the injunction proceedings the attorney general had filed a demurrer to the bill and also a motion to dismiss on grounds of jurisdiction (p. 132). Thereafter the court had held a hearing and heard evidence as to the "issues involved." Therefore this court, in denying the petition for writ of habeas corpus, was acting upon a case in the record of which it appeared *as a question of fact* that facts were presented which would raise a Federal question.

In view of the above discussion of the authorities relied on by respondents, we submit that in none of the cases so cited has this court held that the jurisdiction to pass upon questions solely of state law may be predicated upon an assumption of facts which might result in a Federal question *when those facts were actually controverted by the pleadings before the court.* In each of the cases cited the allegation as to the Federal question was either admitted by demurrer or other pleadings, or by argument of counsel, or the fact itself had been passed upon and found to exist by the lower court in a hearing on the merits. Since in this case the allegations were controverted and no hearing on the merits as to

whether a double tax would result from the tax in question was held by the District Court, we submit that the Circuit Court of Appeals erred in passing upon questions of state law prior to decision thereon by the state courts, and that this court should, if it finds that equitable and federal jurisdiction is shown by the allegations of the bill of complaint, reverse the decision of the Circuit Court of Appeals and remand the case to the District Court for a hearing upon the merits as to the presence in fact of double taxation in the instant case, unless our argument under point III hereof is conclusive in that regard.

We are aware that our discussion here may seem at variance with the statement set forth above, that since the filing of the bill of complaint in this matter the California Supreme Court has, in other cases, passed upon the precise question involved here. Due to the fact that a rehearing was later granted in these cases by the California court, the effect of which is discussed under point V, C, 2 hereof, we are uncertain as to the extent to which this court will consider the law as stated therein binding in the instant case and have therefore presented the authorities herein upon the theory of respondents that the state law has not yet been decisively stated by the California court of last resort.

Of course, if the state law is to be considered settled by these cases, this court is bound to consider the construction of article XIII, section 14 of the California Constitution as set forth therein controlling in this case regardless of the correctness of the decision of the state court; and inasmuch as this court still has jurisdiction of a decision in this case, it would then be its duty to rule in this case in such a manner upon the question resulting

from the construction of article XIII, section 14, as to bring its decision into harmony with the decision of the state court, regardless of the fact there had been no decision by the state courts at the time of the decisions of the District Court and Circuit Court of Appeals herein. (See *infra* V, D.)

B. The Decision of the Circuit Court of Appeals Was in Violation of the Rule That Federal Courts Will Not Interfere With Matters Affecting State Revenue Unless Such Interference Is Imperatively Necessary.

Inasmuch as the present case involves matters of serious moment to the revenue system of petitioner county, it is respectfully submitted that this court should refrain from passing upon a question purely of the construction of the California Constitution, prior to a determination as to the existence in fact of double taxation and discrimination in the instant case, upon this ground in addition to that set forth above.

Thus in *Michigan Central Railway Co. v. Power*, 201 U. S. 245, this court stated the rule in this regard at page 291, as follows:

> "Especially is this true when the statute is one affecting the revenues of the state, and therefore of general public interest. And this reluctance becomes more imperative when the statute has been before the highest court of the state, and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined."

See, also:

Coulter v. Louisville and Nashville Railway Co., 196 U. S. 599, 609.

The same rule was more recently stated (1926) by the District Court in *Royal Mineral Association v. Lord,* 13 Fed. (2nd) 227, at page 229:

> "The two cases last above referred to clearly indicate that the Federal courts are especially loth to interfere where the act in question involves the revenues of the state."
>
> Affirmed in *Lake Superior Consolidated Iron Mines v. Lord,* 271 U. S. 577.

Summarizing, we respectfully submit that this court should not pass upon the question of the correct interpretation of article XIII, section 14 of the California Constitution, inasmuch as this court has no facts presented to it to show that any double taxation or discrimination are presented uopn the facts of the instant case, while the allegations of such double taxation and discrimination are expressly controverted by the allegation of your petitioners' answer to the bill of complaint in the District Court. If this court should find that the allegations of the bill of complaint show both equitable and federal jurisdiction to have been in the District Court and therefore in this court in this proceeding, and unless this court should find that no possibility of double taxation or discrimination is presented by the allegations of the bill of complaint, due to the method by which respondents' gross receipts tax is computed under the provision of article XIII, section 14, we submit that this court should remand this case to the District Court for hearing upon the merits as to the existence in fact of such double taxation, if any, and the discrimination in fact resulting therefrom.

V.

ASSUMING, WITHOUT ADMITTING, THAT FEDERAL AND EQUITABLE JURISDICTION IS SHOWN BY THE ALLEGATIONS OF THE BILL OF COMPLAINT, THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING, AS A MATTER OF STATE LAW, THAT "OPERATIVE PROPERTY" TAXED BY VIRTUE OF ARTICLE XIII, SECTION 14, OF THE CALIFORNIA CONSTITUTION THROUGH THE GROSS RECEIPTS OF RESPONDENTS, INCLUDED THE "TALKING SETS" LEASED TO RESPONDENTS.

Our previous argument herein has been directed to showing that no jurisdiction, equitable or federal, in the District Court was shown by the allegations of the bill of complaint; that no double taxation or discrimination was in *fact* presented in the tax complained of; and finally that since the *fact* of double taxation and discrimination alleged in the bill of complaint was controverted by your petitioners' answer, the Circuit Court of Appeals erred in considering at all the question of state law attempted to be raised by respondents and which, after all, is the real basis of respondents' case.

It is our final contention herein that not only did the Circuit Court of Appeals err in *considering* the question of state law set up by the bill of complaint, but in *holding* that "operative property" included property leased to but not owned by public utilities, the Circuit Court further erred in the construction, as a matter of state law, of Article XII, section 14 of the California Constitution.

Before considering the further substantive question as passed upon by the Circuit Court of Appeals in its decision complained of herein, we desire to meet two arguments which respondents have raised in a very incidental and cursory fashion in their brief. Respondents have referred (Respondents' Brief p. 17) to Political Code, section 3607. This section, in so far as it is pertinent here, reads as follows:

> "but nothing in this code shall be construed to require or permit double taxation."

Assuming for the sake of argument that the "talking sets," if the instant tax is upheld, would be taxed twice, once by the County of Los Angeles and the various municipalities on behalf of which the tax was collected and secondly by the State of California, this would not constitute "double taxation" as prohibited by section 3607. Cooley in his work on *Taxation*, 4th edition, volume I, section 223, says:

> "To constitute double taxation, objectionable or prohibited, the two or more taxes must be (1) imposed on the same property, (2) by the same state or government, (3) during the same taxing period, and (4) for the same purpose."

There is no noxious double taxation where one tax is a state tax and the other is a county or municipal tax.

> *Commonwealth v. Hillside Cemetery Company*, 170 Pa. St. 227, 228.

But if there were double taxation of the noxious variety, still assuming without admitting that there is double taxation of any kind presented here, the constitutional provision would of course prevail over the code section. Thus

it has been held that a double tax by the state upon the same property and for the same purpose may be authorized and required by sections 1 and 14 of Article XIII of the California Constitution.

> *Bank of California National Association v. Roberts*, 173 Cal. 398, 403.

The effect of section 3607 is therefore only another result of the construction of Article XIII, section 14.

Respondents have also claimed that petitioner assessor, since respondents duly filed their return of their "operative property" with the State Board of Equalization, as required by Political Code, section 3665c (erroneously referred to by respondents as 3665b), should have protested the inclusion of the "talking sets" therein in accordance with the procedure set forth in Political Code, section 3666.

This section, insofar as it is pertinent here, reads as follows:

> "If any assessor finds in the report of the operative property in his county, * * * furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as nonoperative * * * he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. He shall also mail a copy of the notice to the company whose property is involved. The said board shall investigate the nature of the property and its use, and, if an agreement between the said board, the assessor and the company as to the proper classifica-

> tion of such property can not be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing * * *. At such hearing, the board shall, from the evidence presented, * * * determine whether such property is operative or non-operative * * *. The said board shall enter its decision in its minutes * * *. Said decision shall be binding * * * unless set aside by a court of competent jurisdiction. * * *"

The purpose of requiring the utility to file with the county assessor a "copy" of the report, in so far as his county was concerned, is clear. It was to give notice to the county assessor of what was claimed as "operative property."

> *Great Western Power Co. v. City of Oakland*, 196 Cal. 131, 138.

In the instant case by the testimony of A. J. Reed, respondents' witness, *no report of the "talking sets" was made at all to the State Board of Equalization*, except in so far as they might be included under the item: "Poles, conduits, cables, wires, instruments," etc. [R. 43.] This clearly did not give petitioner assessor any notice as to the character of property here taxed, as the term "telephone instrument" was defined by A. J. Reed as including not only the "talking set" which was taxed here and was owned by the American Telephone and Telegraph Company, but also a box or desk stand and wiring which were owned by the respondents. [R. 45.] Therefore, petitioner assessor could not have been put on notice by the report, particularly when, as we have pointed out in our introductory statement, until the filing of this bill, these respondents and utilities generally had acquiesced in the *user plus owner-*

ship test laid down by petitioner assessor as to what constituted "operative property."

Furthermore, Political Code, section 3665c, requires the utility to file a report only of "all of *its property*" which it deems operative. It is also alleged in the bill of complaint [R. 12] that respondents filed a report of "all *their operative property.*" As appears from our argument below (V, B), this means property *owned* by respondents. Therefore, the report which respondents were required to file, and, as appears from the allegations of the bill of complaint, the one they did file appeared on its face to allege that the "instruments" were *owned as well as used* by respondents. If this had been the case, of course, there would have been no question that the property was exempt from local taxation and therefore petitioner assessor had no reason to protest the inclusion in respondents' report of any of the property included in the item in question.

In this connection we desire to call to the attention of this court the error of the Circuit Court of Appeals in apparently resting its decision in part upon the "prior practical custom" of not taxing the "talking sets" prior to 1925 by petitioner county. [R. 82.] We doubt the weight of such "customs." But whatever effect it has should be for our position, not as the court below seemed to hold, against us. While the true character of the "talking sets" was thus concealed by a form of report which seemed to indicate that they were *owned* by respondents and therefore not taxable and there is nothing in the record to show that your petitioner county through its assessor did not assess and collect the tax as soon as the true situation was called to his attention, counsel for respondents will not deny, we are certain, that petitioner county had for many

years prior to the filing of the bill of complaint taxed real estate *owned* by private persons and *leased* to public utilities for "operative purposes," without objection from anyone.

There is therefore no element of estoppel or of state law involved here except the one question of the correct meaning of the language of Article XIII, section 14, of the California Constitution. The history of this provision, its language and subsequent decisions of the California Supreme Court, we submit, all show that the true interpretation of "operative property" thereunder includes only property owned and used by public utilities and excludes property simply leased to such companies.

A. The History of Article XIII, Section 14, Shows It to Be a Substituted Property Tax Upon Respondents and Was Not Intended to Exempt From Taxation Property Which Had Not Been Previously Taxed to Public Utilities.

1. The Ordinary Scheme of Taxation in California Is That Property Is Taxed to the Owner Thereof.

The general principle of taxation in California is that the owner, as the one who receives the benefit of property, should also bear its burden.

People v. McCreery, 34 Cal. 432, 457.

Thus assessments are made to the owner if known.

Political Code, Sec. 3628;

Grotefend v. Ultz, 53 Cal. 666;

Houser & Haines Manufacturing Co. v. Hargrove, 6 Cal. Unrep. 384, 390

A tax upon personal property is a lien upon the real property of the owner thereof.

Political Code, Sec. 3717;

Weyse v. Crawford, 85 Cal. 196, 203.

Statutes authorizing suits for collection of taxes provide solely for an action against the owner.

Political Code, Sec. 3771;

California Statutes 1903, p. 130, as amended, Sec. 1 (Deering's General Laws 1923, Act 8471, Sec. 1).

The California Supreme Court in the recent case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, at page 98, expressed the same principle as follows:

> "The underlying theory of taxation in this state has always been that the owner of proper subject to taxation must pay the tax. It needs no citation of authority to that effect. Our whole scheme of taxation rests upon that theory." (See Appendix I, p. 3.)

2. The Framers of the Constitutional Amendment in Providing for a Gross Receipts Tax Intended Simply to Levy the Same Tax on Property Owned by Public Utilities, and Previously Taxed to Them, as Was Levied on All Other Property in the State. There Was No Intention to Exempt Any Property From Taxation or to Remove From Local Taxation Any Property Except That Owned by Public Utilities.

In accordance with the general scheme of taxation in California as set forth above, prior to the adoption of Article XIII, section 14, of the California Constitution in

1910, the property of public utilities was taxed, as was all other property in the state, for city, county and state purposes, with the exception that the assessment of the franchise, roadway, roadbed, rails and rolling stock of railroads operated in more than one county were assessed bv the State Board of Equalization and the same apportioned among the various counties, city and counties, in the proportion to the number of lines of railway laid in such subdivisions. Pursuant to Statutes 1905, page 390, a Commission on Revenue and Taxation was established with authority to investigate the entire system taxation used in California. This commission brought in a report in 1906 (Appendix to Journals of Senate and Assembly, California, Thirty-seventh Session, 1907, Vol. 2, Item 6) which stated its recommendation as to the general system of taxation at page 77, as follows:

"The separation of State from local taxation as to sources of revenue has come to be generally recognized as the one feasible pathway for tax reform.

"As this Commission uses the term 'separation of sources' it means that the counties and local governments shall tax only the private or individual real estate and tangible property within their boundaries, property, that is, which is clearly and distinctly localized. This class of property has a distinctly *local situs* and benefits obviously and directly by local government. *Upon this class of property there shall ultimately be no State tax.* The State, on the other hand, shall tax all those industries, and classes of property sometimes called 'corporate' to distinguish them from the 'private or individual' industries and properties. Such property does not have, in the same sense, a *local situs;* it extends over many communities, serves all, and all contribute to its income. Steam and elec-

> tric railroads, telegraph and telephone companies * * *, all of these have no distinct *local situs*, as does a piece of land, or a business block. The characteristic of all such corporate enterprises is that the value of the business which they carry on in any particular municipality is more or less intimately dependent upon the business carried on by them in one or more other municipalities, rural or urban, and cannot, therefore, be properly estimated or taxed in any one place, or even in a series of places. Such property and industries are general. They belong to the people of the state as a whole, not to any particular community in which by accident their rails, wires, or offices may be."

After an exhaustive study of the tax system then in use in this state, and of the methods of taxation used in other states for the taxation of public utilities, the Commission stated its finding on pages 91 and 94 of the same report, as follows:

> "Gross Earnings Taxes Recommended. The commission recommends that the taxes to be levied on public-service corporations shall be in proportion to gross earnings. The reasons for this recommendation must be made clear, for a large part of the plan of reform depends upon them * * *.
>
> "Theory Demands Net Earnings Tax. Theoretically all taxes, by whatever method they may be levied, should be apportioned among the taxpayers of every class according to net income. Theoretical writers on taxation have never advanced beyond the idea embodied in Adam Smith's famous *dictum*: 'The subjects of every state ought to contribute toward the support of the government, as nearly as possible, * * * in proportion to the revenues which they respectively enjoy under the protection of the state.'

"PRACTICAL DIFFICULTIES OF NET EARNINGS TAX ARE INSUPERABLE. But practically it has proven impossible, without resorting to methods too inquisitorial to be consonant with that freedom of the individual which is so jealously guarded under our system of government, to ascertain the net income of individuals for the purpose of levying taxes thereon.

"There are two possible good substitutes for the theoretically good but practically unworkable tax on net income. *One is a tax on the property, the other a tax on gross earnings. We know by bitter experience that the tax on property fails, especially where large corporate interests are affected. A tax on the gross earnings, at rates for the different classes of corporations which recognize in a broad general way the differences in the proportion of net earnings therein, is the substitute recommended by this commission, in certain cases in which it seems to be practicable and equitable,* * * *."

"Briefly stated, that method is: *'To determine what tax rate on gross earnings is the equivalent of a given rate on the property,* for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property. * * *" (Our italics.)

On pages 95 to 100, the Commission sets forth its finding that the proposed rates will equal 1% of the value of the property owned by the utility, which rate corresponded roughly to the general property tax for all purposes throughout the state upon privately owned

property. The conclusion, as expressed by the recommendations of the Commission, was that the state should be given certain new sources of income, the pertinent provisions of which are set forth on page 12 of the report as follows:

"NEW SOURCES.

"(1) A gross earnings tax on railroads; street railroads; express companies; car companies; light, heat, and power companies; telegraph and telephone companies, at rates fixed for a period of six years by constitutional enactment, after which time they may be amended by the Legislature, but not more frequently than once every six years."

At page 203, the Commission commented on the application of the gross earnings tax to telephone and telegraph companies as follows:

"Telegraph and telephone companies present a particularly clear case of an industry of wide dispersion for which state taxation is peculiarly proper and local taxation distinctly out of place. It is, furthermore, so difficult to assess this class of corporations adequately or equitably on *their property*, mainly on account of the large franchise elements entering into the value of *their property* and contributing to their earnings that the *ad valorem* tax breaks down in these cases." (Our italics.)

At page 208, the Commission stated its conclusion as to the gross earnings tax to be imposed on the telephone and telegraph companies under the proposed constitutional amendment as follows:

"Taking all the foregoing tables and facts into consideration, the telephone and telegraph interests seem to represent a business whose net earnings are about

> 20% of their gross earnings. Taking the 5.5% basis for capitalization found by the Census Bureau to be the true average, then a tax rate of 3.6% would be a fair tax, *or the practical equivalent of a tax of 1% on the gross property.*" (Our italics.)

It is apparent, therefore, that the new mode of taxation was intended to be simply a substitution of a new method of computation and a new payee (the state only instead of the state, counties and municipalities for public utilities; the counties and municipalities only for private property instead of all three as formerly), and was not intended in any way to change the basis of taxation, *i. e.*, that taxes be levied upon none other than the owner of property, or the transfer for use solely for state purposes of the tax on any property other than that *owned* by certain designated classes of public utilities.

The proposed amendments to the Constitution having failed of enactment in 1908, a subsequent report was issued by a second commission on revenue and taxation in 1910, in which appeared, on pages 18 and 19, the following significant paragraph (Appendix to Journals of Senate and Assembly, California, Thirty-ninth Sessions, 1911, Vol. 1, Item 7):

> "All the non-operative property of the above corporations is left subject to local taxation. In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other *classes of property.*" (Our italics.)

In earlier litigation in connection with this same matter, counsel for respondents have referred to the language used by the 1906 commission on pages 95 to 96 of its report (Appendix to Journals of Senate and Assembly, California, Thirty-seventh Session, 1907, Vol. 2, Item 6):

"NET EARNINGS DEFINED.

"In applying the above method it is obvious that we must have a fixed and uniformly applied definition of what constitute net earnings. Since the objection of ascertaining the net earnings is to ascertain from them the value of the property, it is obvious that the net earnings should include all things and only such things as belong to the owners of the property, whether they be the stockholders, or the bondholders, *or the lessors* of property used by the corporation." (Respondent's italics.)

* * * * * * * * *

"RENTS OR RENTAL CHARGES NOT INCLUDED AMONG OPERATING EXPENSES.

"Some corporation officers have argued before the commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on* PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included. All persons readily admit that interest on bonded indebtedness is not an operating expense; if that is the case, rent is not an operating expense. It would have made no difference, so far as this matter is concerned, whether the Southern Pacific build the Lucin cut-off, as it did, with the proceeds of bonds on which

> it pays a certain sum annually as interest, or had leased that great bridge from some other company, paying the same sum annually as rent. In neither case would the annual payment be an operating expense; in each case it is a return to property." (Italics and caps by the Commission.)

Counsel have contended that this language shows that the Commission considered and passed upon the question involved in this litigation and expressly intended the gross receipts tax to be in lieu of all other taxes upon property leased to and used by public utilities, as well as that owned by the utilities. If this were in fact the case, it would, of course, be necessary, as shown from the other references to the report, to charge the Commission with the utmost inconsistency in that no tax had ever been paid before by corporations upon such property, and, therefore, this would not be in any way a substitute tax but a new tax as to the utility and an exemption from taxation as to the lessor.

The true explanation of the matter referred to by counsel for respondents is to be found in the quotation itself. The corporation officers had contended that rentals should be deducted before the net earnings were computed, not for the purpose of showing the rate of final taxation, but to ascertain what the true value of the corporate franchise was. The State Commission was attempting to ascertain not only the value of tangible property, but also that of all the corporate franchises, which were property, and therefore should be taxed along with tangibles on the same basis of valuation. The Commission, in the portion quoted, simply claimed that a corporation which had under lease a railroad line and

therefore could use it in connection with its owned property, had as valuable a franchise and as much intangible property to be taxed as did the same railroad if it had had title to the line but subject to the claims of stock and bond holders.

Even though the construction placed by respondents upon the language of the 1906 report be correct, this would be gainsaid by the language just quoted from the 1910 report and by the arguments addressed to the voters at the time of the adoption of the constitutional amendment, which are quoted below.

At the election of 1910, the argument in favor of the adoption of the amendments, signed by J. B. Curtin, state senator, read in part as follows:

> "That the present system of taxation in force in California is in need of reform will be universally admitted. The only question is as to the adequacy of the proposed reform measure, namely, Senate Constitutional Amendment No. 1, providing for the separation of state from local taxation.
>
> "This amendment is designed:
>
> "*First*—To separate state from local taxation as to sources of revenue and to provide that the state obtain its revenue from the earnings of public service corporations; the counties and cities to obtain their revenues from all other forms of property. * * *
>
> "*Second*—To lessen the burden of taxation of the non-corporated farmer and real estate owner by requiring public service corporations to pay their just share of taxes. * * *
>
> "In order that the voter might appreciate what this amendment is expected to do, the Commission asserts that it will produce annually over four mil-

lions of dollars from sources that are now not paying their just proportion of taxes.

"To illustrate: Such corporations as the express company, telegraph company, and telephone company, operate in every city and county in the state, but in few places in the state do any of these companies have any real estate or personal property, excepting that the express company may own its books and the other companies own a few miles of wires and poles. *All other properties used by these different companies in nearly all of the towns of the state are owned by the agent.*

"Each of these companies do a large and lucrative business in the state, and yet under the present system of *ad valorem* taxes, they can be taxed only for the value of the property that they own in each place, and owning nothing in most of the places, they are taxed nothing. This is especially true in all country towns. Now, under the proposed amendment they are to be taxed upon their gross receipts absolutely, and, as a consequence, will pay nearly four times the taxes that such now pay, and then they will be only paying in the same proportion as other taxpayers are paying on the present basis of taxation." (1908 Report.)

It is significant that Senator Curtin in his argument adverted to the very situation presented to this court, to-wit, the use by public utilities of property owned by others, and yet in no way indicated that such property would be exempt from local taxation by the proposed amendment. Rather, he used it as we have suggested that the Commission did in its 1908 report, to show the unusual value attending the corporate franchise of these

utilities which united by lease and other arrangements rate properties without the necessity of purchase.

In 1912, the State Board of Equalization issued a special report upon the relative burden of state and local taxes in which the purpose of the new method of taxation was restated on page 8 (Appendix to Journals of Senate and Assembly, California, Fortieth Session, Vol. 2, Item 7) as follows:

> "The method by which the Commission on Revenue and Taxation of 1906 arrived at the different rates for the different classes of public service corporations was set forth at length in the report of that commission, beginning on page 93. In substance, that method was to ascertain for each of the different classes of corporations the normal or typical ratio of net earnings to gross earnings, and then to capitalize the earnings so ascertained at a rate of interest assumed to constitute a fair return to the investors in the securities of such classes of corporations. *A theoretical value for the property and franchises in use having been ascertained in this manner, it was then assumed (as the data then available seemed to indicate to be the case), that the average burden of taxation throughout the State was one per cent of the true value of the taxed property, and one per cent of this theoretical valuation of the typical corporation's property of each class having been computed, the next step was to ascertain what rate applied to the gross earnings of such companies would yield an amount equal to that one per cent of the valuation.*" (Our Italics.)

The California courts have also held that the basis of the gross receipts tax is a tax on property to the

owner thereof. Thus in *San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, the court said at page 248:

> "Under the old system, *the property and franchises of the corporations above referred to* were taxed for both state and local purposes. The amendment creates a new mode of *taxing such property and franchises*, and appropriates the revenue so raised to state purposes solely. *The new method, by which taxes are collected exclusively for the state, is substituted for the former system, under which the same subjects were taxed for both state and local purposes.*" (Our italics.)

In *Pullman Co. v. Richardson*, 185 Cal. 484, the court said at page 505:

> "The Commission of 1906 also shows in its report the close approximation between *the value of railroad property as theretofore assessed by the state board of equalization for taxation purposes, and the value to be ascertained by the proposed system.*" (Our italics.)

In the case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 California Decisions 96, the California Supreme Court, on July 2, 1927, in reviewing the history of the gross earnings tax, said, at page 99. (See Appendix I, pp. 5-7):

> "While the constitutional amendment of 1910 worked a radical change in the system of taxation in this state, the purpose of which was to divide the subjects of state and local taxation by imposing upon persons and corporations engaged in certain callings the obligation to pay taxes to be applied exclusively to state purposes, the tax imposed by

article XIII, section 14, is not radically different from the tax provided by the Constitution before the amendment. Under the old system, the property and franchises of the companies, now specially set apart, were taxed for both state and local taxes. The amendment merely creates a *new method of taxing such property* and franchises, and appropriates the revenue so raised to state purposes solely. (*San Francisco v. Pacific Tel. & Tel. Co., supra.*) The tax so imposed remains essentially a property tax (*Pullman Co. v. Richardson*, 185 Cal. 484, 487, 197 Pac. 346.) In submitting the proposed change to the people in 1910, the commission on revenue and taxation, in its analysis of the provisions of the constitutional amendment, contained in its report (p. 18), says: "It (the amendment) leaves the old sections unchanged, except insofar as they are modified by the new section. • • • The amendment provides that certain taxes on the *property* of certain classes of companies, as named and described below, shall be exclusively for state purposes. *It leaves the old system of ad valorem taxation on property in general, other than that of the classes named*, for the use of the counties, cities, school and other districts. • • •

"The taxes reserved for the state are:

"(1) On the *operative property of* railroad companies, etc.

"(2) On the *property of* sleeping car • • • etc. companies, etc.

"(3) On the *property of* express companies, etc.

"(4) On the *property of* telegraph and telephone companies, etc.

"(5) On the *property of* all light, heat, and power companies, etc. (Their italics.)

'All the non-operative property of the above corporations is left subject to local taxation.'

"It seems most reasonable to say that the Commission, in explaining to the voters the nature of the change to be brought about by the new system of taxation, used, and expected the people to understand, the expression 'property of' in the plain and ordinary sense of 'belonging to,' and as indicating ownership in the public service companies which at that time were assessed for and were compelled to pay local as well as state taxes on all property owned by them. Property not owned by the companies, but leased by them, was not assessed to them, and they were not required by law to pay taxes, state or local, thereon." (See Appendix I, pp. 5-7.)

From the above summary of the history of the adoption of the gross earnings tax provisions in the California Constitution, we believe that it clearly appears that it was intended by the framers of the constitutional amendments of 1910 that the new tax should simply provide a transfer of payees of the taxes formerly paid by public utilities, to wit, to the state alone, instead of the double payee of state and local bodies, and a different means of computing the tax previously paid which would bring about substantial equality between non-utility and public utility holdings. There was no change in the theory of taxation, which is that the tax on property was to be borne by its owner, even where the public utilities were concerned.

Secondly, despite anything which appears in the report of the Commission in 1909, the arguments addressed to the voters upon which they must be presumed to have

relied in adopting the amendments providing for the new tax, were simply concerned in securing more taxes from the public utility corporations. The very situation presented in this case was covered in the arguments to the voters, but without any suggestion, to follow the illustration used by Senator Curtin, that an exception of the property *owned by* the *agents*, but *used by* the *express companies*, would result from the adoption of the amendment. Indeed, from the whole tenor of the argument relied on by the voters, it is evident that any hint of exemption would have been fatal to the adoption of the amendment.

B. The Language of Article XIII, Section 14, Requires a Construction of the Property Tax Thereunder Which Is Limited to Property Owned by Public Utilities.

It is our contention that not only does the history of the adoption of section 14 of article XIII of the California Constitution support our contention that "operative property" is limited to property *owned* and *used* by the public utility, but that such a construction is the necessary result of the language of the section itself.

As set forth below, the construction urged by respondents flows mainly from the use of the words "their" and "property." However, no matter what the literal meaning of these words may be, we submit that our construction is upheld by a common sense interpretation of the gross receipts method of taxation as used in California, which has been long followed by both the legislature in statutory enactments and the Railroad Commission in public utility decisions.

1. The Use of the Words "Property" and "Their" in Article XIII, Section 14, Requires Ownership, Not Merely Use.

As set forth above, article XIII, section 14, defines "operative property" of the utilities set forth therein as "*their* franchises, roadways • • • and other *property* or any part thereof *used exclusively in the operation of their business.*"

Respondents will doubtless insist that "property" includes any plant or facilities *possessed* by the utility so long as it is *used* by it; while it is our contention that the propety must be both *owned* and *used*. Or in other words, repondents' position is that *user alone* determines what is operative property, while the appellants maintain it is *user plus ownership*.

In *State Land Settlement Board v. Henderson*, 197 Cal. 470, the California Supreme Court had before it the meanig of article XIII, section 1, providing that "property • • • as may belong to the United States, this state • • • shall be exempt from taxation." At pages 480 to 481 the court said:

> "All the dictionaries give to the word 'belong' among other meanings, the definition: 'To be the property of' (Webster, Century); 'To be possessed by' (Worcester). (*San Francisco v. McGovern*, 28 Cal. App. 491, (152 Pac. 980).) Other examples and illustrations of the meaning of the word 'belonging to' are given to show that the words used in a constitution are equivalent to 'the property of.' The words 'belong to' are equivalent to the words 'owned by.' The primary meaning of the term is 'to be the property of.' It implies ownership. (7 C. J., 1039, and note.) There is ample

authority in this and other jurisdictions to sustain this construction. Many of the revenue acts of this state would have an uncertain meaning if we were to depart from the evident meaning of the word as used in the state constitution."

In *Pacific Telephone and Telegraph Company v. State Board*, 74 California Decisions 96, the California Supreme Court held, as set forth above, that the property requirement of section 14 was limited to property owned by the utilities, saying at pages 98 to 99 (see Appendix I, pp. 4-5):

"Petitioner cannot claim that before the change in the method of taxing public service companies went into effect it was liable for taxes levied on leased property occupied by it and used in its business. This court has always considered the present form of taxing such companies to be in fact what it purports to be, namely, a tax upon the property of the utility as it is described in the Constitution. (*Pullman Co. v. Richardson*, 185 Cal. 484, 489, 197 Pac. 346.) We are now asked to enlarge section 14, *supra*, beyond its commonly accepted scope, and to place upon its provisions an interpretation which we believe the entire context of the section does not warrant. We may concede that it is the use of the property that determines whether or not it is 'operative' in character (*San Bernardino v. State Board of Equalization*, 172 Cal. 76, 79, 155 Pac. 458); but it is 'use by the owner' that fixes its status. We are of the view that the provision in section 14 that, in lieu of all other taxes and licenses, telephone and other companies shall annually pay to the State upon *their* franchises, etc., and other property, or any part thereof used exclusively in the operation of *their* business, a tax measured by

a given percentage of gross receipts, limits the property on which such tax must be paid to property owned by the companies, and cannot be held to include leased property not owned by them. In addition to what we accept as the plain meaning of the constitutional provision, through the use of the pronoun 'their' in pointing out the property liable for the substituted tax, we cite, in support of our conclusion, the reason for and history of the adoption of the amendment (see *San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 135 Pac. 971), circumstances connected with its adoption, and legislative action following its ratification. While such matters are not conclusively binding on the court, they are of assistance in the present case, for they confirm our view as to the proper construction to be applied in the case." (See Appendix I, pp. 4-5.)

The interpretation placed upon the construction of this language by the California courts is in accord with that given similar language by the courts of other states. Thus in *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845, the Illinois Supreme Court construed article IX, section 3, of the Illinois Constitution authorizing the exemption of "the property of the state, counties, and other municipal corporations * * * and such other property as may be used exclusively for * * * school * * * purposes * * * " and section 2 of the Illinois revenue law providing that there should be an exemption from taxation of "all public school houses; all property of institutions of learning * * *" as not including real property owned by the head of a private school and his wife, saying at page 24, (22 N. E. 847):

"*In other words, that which is called 'Wyman Institute,' although a school and institution of learning of high character, was from a legal standpoint but private property, belonging to the complainants, one or both*, and was not only incapable of holding the legal or equitable title to property, but neither it nor the lands upon which it was located, nor the personalty connected therewith, were the subjects of a trust which the courts could recognize or enforce at the instance of the public or of any supposed beneficiary or beneficiaries, either natural or artificial. *Our conclusion, then, is that the property described in the bill of complaint cannot be regarded as the property of an institution of learning, and that essential element being absent, such property cannot properly be adjudged exempt from taxation.*" (Our italics.)

Followed in *People ex rel. Pavey v. Ryan*, 138 Ill. 263, 267, 27 N. E. 1095, 1096.

In *People ex rel Carr v. City of Chicago*, 323 Ill. 68 (1926), 153 N. E. 725, 726, the court held that the Illinois constitutional provision reading, "*the property of the state, counties, and other municipal corporations* • • • may be exempted from taxation," did not authorize the exemption from taxation of private property leased to a city and used by the city for playgrounds, police department buildings, a fire engine house and a public hospital, inasmuch as the property in question was not "property of" a municipality.

See also

People v. City of Toulon, 300 Ill. 408, 413 (1921);
People v. Bennett Medical College, 248 Ill. 608, 610; 94 N. E. 110, 111.

In *Portsmouth Shoe Company v. City of Portsmouth,* 66 Atl. 1045, the New Hampshire Supreme Court construed the tax exemptions resulting from a statute permitting any town to exempt "any manufacturing establishment proposed to be erected or put in operation, and the capital to be used in its operation," and a city ordinance exempting the plaintiff in question as not an authority for an exemption of property used but not owned by the exempted corporation. The court said, at pages 1045, 1046:

> *"If the mere use of the property, without regard to its ownership, had been intended to be the test to determine whether it could be exempted under the statute, it would be natural to expect more explicit language to such a purpose. The 'manufacturing establishment' referred to in the statute means, or relates to, the property of the proprietors of the industry, who receive the benefit conferred by the statute, and not the property of others having no interest in the prosecution of the business."* (Our italics.)

In *Laurent v. City of Muscatine,* 59 Iowa 404, 406; 13 N. W. 409, 410, the Iowa Supreme Court held that under a section of the Iowa code exempting *"grounds and buildings of* • • • religious institutions and societies," a lot owned by the pastor of a church which used it as its sole means of access to the church building was not exempt although the pastor received no rent therefrom. This case was followed in *In re Dille,* 119 Iowa 575, 93 N. W. 571, 572.

Again, under a constitutional provision (Art. 118, Louisiana Constitution of 1868) reading in part: "The

General Assembly shall have power to exempt from taxation *property* actually used for church, school or charitable purposes," the Louisiana Supreme Court held in *Armand v. Dumas*, 28 La. Ann. 403, that property used exclusively for school purposes was properly taxed to the owner when she leased it for such purposes, the court saying, at page 403:

> "Here the plaintiff does not keep the school. She owns the property, and derives revenue from the rent thereof. *We do not see why she should not pay taxes on such property, just as those who rent houses to dry-goods merchants are held to pay theirs.*" (Italics ours.)

Counsel for respondents have in earlier litigation attempted to distinguish these cases on the ground that they deal with "exemptions from taxation, not a substituted tax." This we do not deny, but we submit that in each of these decisions of five states, the court arrived at its conclusion from a study of the *meaning of the language* and not by any rule of strict construction arising out of their exemption character.

We submit, therefore, that the language of the California Constitution limiting as it does the term "operative property" to *"their property • • • used exclusively in the operation of their business,"* as it has been formerly construed by the California courts, and as similar language has been construed by the courts of Illinois, Iowa, New Hampshire and Louisiana, includes only property of the utilities *owned and used* by them.

2. Subsequent Construction of Article XIII, Section 14, by the State Legislature and Railroad Commission Has Limited the Property Taxed by the Gross Receipts Tax to Property Owned by Public Utilities.

Not only does it appear from the language of Article XIII, section 14, that "operative property" thereunder is limited to property owned by public utilities, but we submit that the California legislature has so construed the constitutional provision for many years. Such a construction has been held to be entitled to the greatest deference by the California courts.

> *Board of Commissioners v. Market Street Railway Co.*, 132 Cal. 677, 681.

Thus in paragraph 2 of section 3665c of the Political Code, wherein is set forth the property which a utility shall include in its report to the State Board of Equalization as "operative," it is provided that the utility shall report all of *its* property of such a character, *and no other property is mentioned*. Section 3668b provides that *any property* upon which taxes are delinquent may be seized and sold. Section 3668c provides that the gross receipts tax shall be a lien upon *all the property and franchises belonging to the company*, subject to the tax, and shall have the effect of a judgment against the company and of an execution duly levied against *all of the property* of the delinquent.

This language clearly means unqualified ownership, as was well set forth in *San Francisco v. McGovern*, 28 Cal. App. 491, at page 500, in which the California court said, in interpreting the word "belong" as used in Article XIII, section 1, of the California Constitution:

> "The word 'belong' is applied alike and with the same force and meaning to the United States, this state, and to counties and municipalities, and it seems to us was employed to denote *an unqualified ownership* of the property, not an ownership subject to the condition that it was to be used exclusively for governmental purposes." (Our italics.)

In *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, the California Supreme Court said at page 100:

> "The primary meaning of the phrase 'belonging to' is 'to be the property of.' (7 C. J. 1039.) The judgment is not satisfied, nor the lien removed, until the tax, penalty and costs are paid, or the property sold for payment. We, therefore, conclude that, in order that the companies whose property is subject to taxation for state purposes may claim an exemption of their operative properties from local assessment and taxation, *it must first appear that the property belongs to the claimant, that is, in the sense that it is owned by it.*" (Our italics.) (See Appendix I, p. 9.)

The courts of other states have also interpreted the word "belonging" to mean absolute ownership.

> *People ex rel. McCullough v. Bennett Medical College*, 248 Ill. 608, 610, 94 N. E. 110;
>
> *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201, 207;
>
> *Douglas Co. Agri. Society v. Douglas Co.*, 104 Wis. 429, 430, 80 N. W. 740.

In *Lake Shore and Michigan Railroad Co. v. City of Grand Rapids*, 102 Mich. 374, 60 N. W. 767, the Michigan Supreme Court applied such an interpretation of the

language to a case almost identical with that presented to this court. By the corporate charter of the railroad it was provided that in return for the payment of an annual tax of three-quarters of one per cent of its capital stock, "the property and effects of said company * * * shall * * * be exempt from all and every other tax, charge or exaction by virtue of any laws of this state now or hereafter to be in force * * *." The court at page 378 held (60 N. W. 769):

> "Whatever the rights of the complainant company may be under the act of 1846 as to taxation, that act cannot be made applicable to this leased road, it being organized under the general railroad law. The exemption from taxation under the act of 1846 was a special privilege granted to the Michigan Southern Railroad Company, but it cannot be extended to such lines as that company might thereafter lease and operate, which were organized under the general railroad laws of the state."

In view of the construction which must be given to the tax lien created by section 3668c it is apparent that this section, under the construction contended for by respondents, would permit property owned by the utility to be seized and sold for taxes levied upon the leased property, or the sale of the property owned by one person for the tax of another. We submit that this was not the legislative intent but that in fact the legislature construed the word property throughout the complicated provisions of the Political Code providing for the collection of the gross receipts tax as meaning at all times only property owned by the public utility and did not contemplate the application of these sections or of the gross receipts tax to property leased to public utilities.

Again, as we have set forth in our introductory statement, the argument of respondents here applies as well to motor vehicles of employees as it does to the talking sets in question. Yet the California legislature, in section 78 of the California Vehicle Act (California Statutes 1923, p. 517; Deering's General Laws, Act 5128), has expressly provided that "registration fees specified in this act need not be paid for any motor vehicle, trailer, or semi-trailer • • • nor for any light vehicle *owned by and used exclusively* in the operative work of such corporations as are taxed solely for state purposes under the constitution of this state." There certainly could not be a clearer statement of legislative intent to include under the term "operative property" only that owned by the utility.

Counsel for respondents will doubtless refer to the language of section 3665b noted in our introductory statement which purports to give a definition of "operative property" of telephone and telegraph companies and inserts simply the test of use. It is our contention that we are concerned here only with the language of the constitution itself and that no legislative enactment *squarely in the face of a constitutional provision* can alter or effect the determination of this case. Thus the California Supreme Court in the recent case of *Pacific Telephone and Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, said at page 100:

> "if the definition of 'operative property' in the code is not in harmony with the Constitution, the provision in the Constitution must prevail." (See Appendix I, p. 8.)

See, also:

San Diego etc. Railroad Co. v. State Board of Equalization, 165 Cal. 560, 565;

Lake Tahoe Railway etc. Company v. Roberts, 168 Cal. 551, 556.

However, we do not admit that the definition included in section 3665b shows any intention upon the part of a legislature to include leased property. The purpose of the section was simply to distinguish between that character of property which by its *use* was operative and that which by its use was non-operative. We submit that the legislature, consistent with its other provisions in the code, assumed that the various named articles in section 3665b would be owned by the public utilities in question. Furthermore, as appears above (see Point III, B hereof), the Railroad Commission for many years in its public utility rate decisions has interpreted "operative property" under this section to include *owned* property only and has at all times excluded leased property from such a definition.

We therefore submit that the language of article XIII, section 14, itself requires a construction of "operative property" which includes only *owned* property of the public utility and that such a construction of article XIII, section 14, has been placed upon the constitutional provisions since their adoption by the California legislature and Railroad Commission.

C. The Exact Question Presented Here Has Been Passed Upon by the California Supreme Court Adversely to the Decision of the Circuit Court of Appeals.

Not only, however, is the decision of the Circuit Court of Appeals opposed to the history, the clear meaning and

the subsequent legislative and administrative construction placed upon article XIII, section 14, but we submit that the precise question presented to this court, to-wit, whether "operative property" includes only that *owned* and *used* or whether article XIII, section 14, should be construed to include all property *used* by the utility has been passed upon squarely by the California courts adversely to the decision of the Circuit Court of Appeals.

1. The Decisions of the California Supreme Court Have Long Inferentially Held That "Operative Property" Was Limited to That Owned by Public Utilities.

In *Pacific Gas and Electric Co. v. Roberts*, 168 Cal. 420, decided in 1914, or only four years after the adoption of "Constitutional Amendment No. 1" at the election of 1910, we find the court intimating that the property which was exempted from local taxation by virtue of the section was only that owned by the public utilities. The case arose upon an original petition in mandate to compel the respondent as state treasurer to accept applications for registration of certain motor vehicles which were owned by petitioner utility and to signify that no fees were chargeable for their issuance. (p. 421.) The question squarely raised then was whether automobiles *owned* by the public utility were by virtue of the new amendment to the Constitution exempted from the state license tax imposed upon all other motor vehicles. At page 423, the court said:

> "The vital point in controversy centers upon the construction of the sentence [in article XIII, section 14] 'such taxes shall be in lieu of all other taxes and

licenses, state, county, and municipal, upon the property above enumerated.'"

After discussing the history of the adoption of the amendment in 1910, the court, in holding that the writ of mandate should issue, continued at page 425 as follows:

"So much for the justness and reasonableness and legality of the new method. Further, it was believed that the income of the state could be largely drawn from these sources with great advantage both to the state and to the public service utilities, in that the method would be simple, direct, and inexpensive as compared with the existing method, necessitating the action of many assessors and numerous appeals to boards of equalization, and, also, that the new method would remove all temptation to such utilities to engage in political activity. *Having subjected public utilities to this revised form of taxation, it was for the people under this constitution to say whether these new taxes should be all of the taxes and charges imposed upon such corporations, and if not all then for what purposes could they or their properties be further taxed.* For manifestly it was competent for the constitution to declare that this commutated tax should be in lieu of all taxes, should be in lieu only of *ad valorem* taxes, or that it should not forbid the right to levy privilege taxes. *What the constitution did say in this regard is found in the sentence expressly quoted and adverted to, and it is to the construction of this sentence we are thus brought.*" (Our italics.)

Again at page 430 the court says:

"Of course, as in the case of every tax and upon whatsoever form or kind of property it may be laid

in its essence, it is a tax upon the owner of the property.

"With these distinctions in view, it is easy to be seen that the decisions above adverted to clearly declare that the privilege occupation tax is forbidden by the constitution. And yet certainly there is not so clear an inhibition against this tax as there is against the privilege tax upon the *property* exclusively used in the operation of the business. For in precise terms it is declared that the state tax shall be in lieu of all 'other taxes and licenses * * * *upon the property* * * * of such companies.'" (Italics by court.)

In *Pacific Gas & Electric Company v. Roberts*, 176 Cal. 183 (1917), plaintiff was a California corporation engaged in the sale of gas and electricity. The Suburban Light and Power Co. was operated as an independent company although in fact a subsidiary of the Pacific Gas and Electric Co. The gross receipts of the Suburban Light and Power Co. were $188,401.60 which were the results of the sale of gas and electricity by the said corporation. Large quantities of both gas and electricity, however, were purchased from the plaintiff for the sum of $52,717.99. Plaintiff's gross receipts were $7,816,313.12, but it in turn had purchased electricity in the amount of $972,293.52 from independent companies. The State Board of Equalization operating under article XIII, section 14, and the sections of the Political Code adopted under its authority had assessed to plaintiff, both upon the properties of the Suburban Light and Power Co. and its own properties, a tax at the rate of 4% upon the gross receipts of both companies without allowing any deduction for the amount paid by the Suburban Light and

Power Co. to plaintiff for its gas and electricity, or to plaintiff's vendors upon the amounts paid by plaintiff for electricity purchased from independent concerns. It was contended before the court in an appeal from judgment for the defendant upholding the validity of the determination by the State Board of Equalization that if the Pacific Gas and Electric Co. had owned and operated the distributing system in fact owned and operated by the Suburban Light and Power Co. and had manufactured and sold to ultimate consumers, at the same price, the same quantity of gas and electricity which was sold to the Suburban Light and Power Co., the entire amount of tax which would have been assessed upon all of the property which was in fact owned during that year by the Suburban Light and Power Co., would have been 4% of $188,401.60 instead of 4% on that sum plus 4% on the $52,717.99 which was the sales price of the gas and electricity sold by the Pacific Gas and Electric Co. to its subsidiary. In other words, as here, appellant insisted that double taxation was resulting from computation of taxes upon the same property, the plant of the Pacific Gas and Electric Co. having produced the gas and electricity which was simply transmitted to the ultimate consumers by the subsidiary company.

In affirming the judgment below, however, the court said at pages 188-9:

> "It thus appears and has been definitely cited by this court that the tax, whatever its scientific essence, is levied upon property created in part by the unity of use of *other property*. There is a unity of use in the distribution of gas and electricity sold to its consumers but such a corporation as the Pacific Gas and

Electric Co., whether those commodities be produced in its own retorts and by its own generators or purchased ready-made from other corporations. The tax *might* be levied upon the gross earnings (as indeed it is in some states), but we see nothing to prevent its ascertainment by calculating a certain percent of the 'gross receipts from operation.' Either method would be a 'commutated or substituted' tax upon *properties* which have acquired peculiar and special worth because of their 'unity of use'." (Our italics.)

In *Union Tank Line Co. v. Richardson*, 183 Cal. 409, the court held that a New Jersey corporation engaging in the acquisition by purchase or otherwise of oil tank cars and the leasing thereof to shippers throughout the United States did not cease to come within the meaning of "car companies operating upon railroads in this state" under the provisions of article XIII, section 14 of the California Constitution by virtue of the fact that it had relinquished control of rolling stock which it had under lease to the Standard Oil Company, a corporation not taxed by virtue of the gross earnings tax. At page 414, the court said:

"'The taxes reserved for the state are: • • • (2) On the property of • • • car, *and all other car companies*. • • •' (Italics ours.) *To hold that plaintiff, because of the terms of its contract with the Standard Oil Company under which it relinquished to the lessee the control over its cars, was not subject to the payment of the tax authorized by subdivision (a) would be in effect to hold that any concern conducting a business in this state of one of the classes enumerated in the section could evade the payment of this tax by entering into*

a similar arrangement by which it would receive the earnings of its property in the state while the control thereof was stipulated to be in a lessee." (Our italics.)

This case represents the converse of our situation—a public utility attempting to evade the state tax because it had leased its property to a corporation which was not a public utility, and which was subject to local taxation. In our case, a company owning property subject to local taxation claims immunity (by means of the action of its subsidiaries) from the local tax claiming that the property is subject to a state tax and that if the American Telephone and Telegraph Co. is taxed, that tax must of necessity be passed on to the subsidiary resulting in double taxation. This argument, of course, is fallacious upon its face because it applies to every possible situation in which a tax by virtue of the sale of or use of commodities can be passed on to a third party. A tax upon the land occupied by a grocery store is not paid by the owner, in the last resort, but by the groceryman. The groceryman, if he is successful, passes on the tax which he has paid on behalf of his landlord to the ultimate consumers of the groceries which he sells. Yet the transfer of such taxes cannot be considered in any system of taxation. This was held as long ago as 1873 by the California courts when the Supreme Court said in *Savings and Loan Society v. Austin*, 46 Cal. 416, 502:

> "It was earnestly urged by counsel, that the debt for money loaned should be exempt from taxation, because the taxes must, by the inevitable operation of the rules of trade, be paid by the borrower. Under the operation of the same rules, the consumer pays

> the tax imposed on all merchantable commodities; and the tenant pays the taxes directly or indirectly on the leased premises. Would that result be urged as a sufficient reason for exempting from taxation all merchantable commodities, and all lands held under lease? Does the fact that the borrower, from a bank paying indirectly the taxes on the bank building, afford a sufficient reason for exempting such building from taxation?"

It thus is evident that the courts of this state have long held that the tax levied upon the property of certain public utilities by virtue of article XIII, section 14 of the California Constitution is a tax upon the property *owned* and *used* by the utility, not simply upon that *used* by the utility. Furthermore, it is apparent that the courts of this state have refused to predicate construction of statutes upon a mere incidental shift of the final burden of the tax, inasmuch as all taxes are so shifted as a matter of practical experience.

2. By Its Decisions in Pacific Telephone and Telegraph Co. v. State Board of Equalization, 74 California Decisions 96, and Southern California Telephone Co. v. State Board of Equalization, 74 California Decisions 102, the California Supreme Court Has Expressly Held That Property Leased to Public Utilities Is Not Taxed Through the Gross Receipts Tax.

Not only has the California Supreme Court inferentially passed upon the question involved in the instant case but on the second day of July, 1927, the California Supreme Court rendered decisions in the two cases of *Pacific Telephone and Telegraph Co. v. State Board of*

Equalization, 74 California Decisions 96, and *Southern California Telephone Co. v. State Board of Equalization*, 74 California Decisions 102 [see Appendices I and II to this brief], in which the precise question involved here was passed upon contrary to the determination by the Circuit Court of Appeals. These cases are hereinafter referred to as the *"State Board Cases."*

These decisions arose upon applications for original writs of mandate in the Supreme Court directed to the State Board of Equalization to compel the listing by the State Board of Equalization of certain real property under *lease* to the Pacific Telephone and Telegraph Co. and the Southern California Telephone Co. as "operative property" of these two corporations upon the report made by them in conformity with the provision of Political Code section 3665c, referred to above, which had been so reported by them and struck off by order of the State Board of Equalization. The property which was the subject of the writ in the *Southern California Telephone Company Case* included a ten-story office building in the center of the city of Los Angeles, used as the main headquarters for that company. Although the character of the property was not identical with that of the instant case, yet the same question of law arising out of the leasing of property owned by non-utility corporations to a public utility to be used for "operative" purposes was squarely presented to the Supreme Court of California.

As appears from the cases set forth in the appendices to this brief [Appendix I, p. 1], the petitioners for the writ were represented by the same counsel as appear here for respondents. The State Board was represented by U. S. Webb, Attorney General for the state of Cali-

fornia, and Frank L. Guerena, his deputy, while Everett W. Mattoon, County Counsel of Los Angeles County; J. A. Tucker, Deputy County Counsel on behalf of petitioner county herein, and Dixwell Pierce, Secretary of the State Board of Equalization, appeared as *amici curiae*. The proceeding therefore was in no manner a feigned one and the decision was rendered by the court after full and careful discussion, as will be seen from reference to the decision, of the same authorities relied upon by the Circuit Court of Appeals in the instant case.

Since the state court in these two decisions went thoroghly into the question presented here and squarely decided for state purposes the correct interpretation of article XIII, section 14, we are printing these decisions in full in appendices I and II to this brief, and respectfully direct the attention of this court to the reasoning contained therein. In doing so we are not unmindful of the fact that subsequent to this decision the petitioner in the two aforesaid cases applied for rehearing by the Supreme Court and that said petitions for rehearing were granted on July 30, 1927, as reported in the minutes of the Supreme Court appended to 74 California Decisions 178. Thereafter, on August 3, 1927, the petitioners for said writ moved to dismiss their applications, urging as their reasons that the cases had become moot, in that the state board no longer had jurisdiction under Political Code section 3668, which limits the sessions of the board to the period between the first Monday of March in each year to the first Monday in July, to alter or amend the report of petitioner's "operative property." This motion was granted on August 4, 1927, as reported in the min-

utes of the California Supreme Court appended to 74 California Decisions 198.

However, had the petitioners desired a determination by the California Supreme Court of the principle involved in these cases and the instant one, ample authority and precedent exists in the state of California for the decision of a case on its merits even though at the time of determination the particular case presented may have become moot.

Bradford v. San Francisco, 112 Cal. 537, 547.

Inasmuch, moreover, as the motion to dismiss was made by the moving party before submission of the case, since the effect of the rehearing was tantamount to the granting of a new trial and the resubmission of the case thereon (it must be remembered that the cases were original proceedings in the Supreme Court), the Supreme Court was of necessity compelled to accede to the request of counsel, as in California the moving party before submission of the case has the absolute right to dismiss.

Code of Civil Procedure, section 581, subdivision 1;
MacDermot v. Grant, 181 Cal. 332, 334;
Strupelle v. Strupelle, 59 Cal. App. 526, 529;
Hindle v. Warden, 50 Cal. App. 356, 362.

Nor do we overlook the fact that the California Supreme Court has held in *Miller & Lux, Inc., v. James*, 180 Cal. 38, 48, that the effect of the granting of a rehearing is to vacate the previous opinion and judgment and set the whole matter at large. We submit, however, that until some other opinion has been expressed by the California courts the decision written by Mr. Chief Justice Waste of the California Supreme Court and concurred in by four of the remaining five justices must be

regarded by this court as the last and, in fact, the only direct expression of the California courts upon this precise subject, and that the state law of California, until such later decision, has now been decided contrary to the decision of the Circuit Court of Appeals complained of herein.

3. The Decision of the Circuit Court of Appeals in This Case Was Referred to by the California Supreme Court and Is Criticised in the Above Decisions.

It is noteworthy that the decision of the Circuit Court of Appeals in the instant case was brought to the attention of the California Supreme Court in the decisions referred to above and commented upon by Mr. Chief Justice Waste, 74 California Decisions 96, 101, as follows [See Appendix I, pp. 9-10]:

> "We have examined the authorities relied upon by the petitioner to support its claim for an exemption of the leased buildings from local taxation. Almost the precise question submitted by the application now before us was considered in *Southern California Telephone Co. v. Hopkins*, 13 Fed. (2d) 814, in a case involving certain parts of 'talking sets' leased by the telephone company from another corporation and used as integral parts of certain instruments in the operation of the company's business. The Circuit Court of Appeals held that unity of use, and not ownership, determined whether or not the property was properly classed as 'operative' under the provisions of the California Constitution. The cause has been transferred to the Supreme Court of the United States, where it now awaits final decision. We find ourselves in direct disagreement with the construc-

tion adopted by the federal court, because of what we believe to be the plain intent and meaning of the constitutional provisions." [See Appendix I, pp. 9-10.]

Therefore we submit that not only has the California Supreme Court passed upon the legal question involved herein, but by *dictum* has passed upon the very case here presented to this court and has, upon the question of state law, held contrary to the decision of the Circuit Court of Appeals.

D. It Is the Duty of This Court, in Questions of State Law, to Follow Decisions of State Courts Arising After the Federal Litigation Originated, If Jurisdiction Still Remains in the Federal Court to Render Judgment.

It is respectfully submitted that even though the decision of the Circuit Court of Appeals upon the construction of article XIII, section 14 of the California Constitution appeared more consonant with the basic principles of taxation in California—which we deny—still it is the duty of this court to reverse the decision of the Circuit Court of Appeals in order to bring the decision of the federal courts into line with the law of California as indicated in the expression of the California courts. The present Chief Justice, as a circuit judge, in *Western Union Telegraph Co. v. Poe*, 64 Fed. 9, cited above, said at page 11 anent a ruling made by him on demurrer based upon a question of state law prior to decision by the Ohio courts thereon and thereafter decided to the contrary by the Ohio courts:

"It seems to me manifest that it is the duty of this court to reverse its former ruling, and make it

harmonize with that of the tribunal which has ultimate authority on the subject."

Later, after affirmance by the Circuit Court of Appeals of the decree of the Circuit Court dismissing the bill, an appeal was taken to this court, reported as *Adams Express Co. v. Ohio*, 165 U. S. 194, and Chief Justice Fuller speaking for the court, referred to the interpretation of state law at page 219, as follows:

> "The contention that the act in question is invalid because repugnant to the constitution of the state of Ohio has been disposed of by the decision of the highest tribunal of that state sustaining its validity, *State v. Jones*, 51 Ohio St. 492. These cases fall within no recognized exception to the general rule that the construction by the state courts of last resort of state constitutions and statutes will ordinarily be accepted by this court as controlling."

See, also:

League v. Texas, 184 U. S. 156, 158;

Merchants Bank v. Pennsylvania, 167 U. S. 461, 462;

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 686;

Hannan v. First National Bank, 269 Fed. 527, 537 (C. C. A., 8th Cir.).

Nor is this a case like that decided in *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, in which this court held, at page 242, that it was not bound by the state court decision, inasmuch as the state court had not passed squarely upon the alleged conflict with the provisions of the state Constitution, for in the *State Board Cases*, referred to above, the same issues were presented to the California

Supreme Court as are presented to this court and this very case was discussed by way of *dictum*.

We are aware that counsel for respondent will contend strenuously that since the California Supreme Court, by granting a rehearing in the *State Board Cases, supra*, and the subsequent dismissal of the proceedings has in fact vacated the decisions relied on by us and that therefore there is in fact no state law for this court to follow. It must be remembered that no *reasons* were assigned in the order of the court granting the rehearing and the only one which appears from the record of the case is that on the petition for rehearing a new friend of the court filed a brief supporting the petition for rehearing. (See Minutes of Supreme Court of August 4, 1927, appended to 74 California Decisions 198.) *It cannot be assumed that, had these respondents permitted the state court to render final decision therein, a different decision would have been rendered, but the proper inference is that the court simply desired to permit of complete and ample hearing of all the authorities proferred in a case of such importance.* It is therefore our belief that, inasmuch as these cases constitute the last word from the state court, they should be regarded by this court in practically the same fashion as if no rehearing had in fact been granted.

Even if this court holds, however, that our position in this respect is not correct, yet we submit that it is the duty of this court not only to follow binding decisions of state courts but in so far as possible in deciding questions of state law to foresee the decisions of the state court in such matters.

In other words, this court has long held that it will not decide a question of state law, as this court might decide it if it were a question of federal law, but as this court believes the state tribunal will decide when the question is presented to it.

Pullman v. Knott, 235 U. S. 23, 27;
Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 305;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, 291;
Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 609;
Pelton v. National Bank, 101 U. S. 143, 144;
Royal Mineral Association v. Lord, 13 Fed. (2nd) 227.

Therefore, no matter whether the decisions of the California Supreme Court in the *State Board Cases* be regarded as tantamount to controlling expressions as to state law by a state court or only as an indication of how that court will rule in the future, we submit that this court is under an obligation to follow that indication and reverse the decision of the Circuit Court of Appeals holding that "operative property" under the California Constitution includes leased property, *particularly as the California court has indicated its position upon the facts of this very case.*

E. Authorities From Other States Relied on by the Circuit Court of Appeals Are Not Applicable to the Situation Here Inasmuch as the Cases Arise Under Totally Different Statutory Provisions.

The Circuit Court of Appeals in its decision [R. 83-85] rested its decision as to the proper construction of

article XIII, section 14, upon certain decisions from other states. It is our contention that the court erred in holding that these decisions were applicable to the facts in the instant case, inasmuch as the constitutional provisions in each case were entirely different from those presented here. We will, therefore, consider separately each of the decisions so cited and relied upon by the court.

In *Merrill Railway etc. Co. v. City of Merrill*, 119 Wis. 249 [cited R. 83], the Wisconsin court had before it for application a statute providing for taxation of the gross receipts of street railways which also provided that after payment of the tax "personal property, franchises and real estate *owned and actually necessarily used* by said person, company or corporation in the operation of its business, shall be exempt from taxation and other license fees". The plaintiff had leased a power plant to replace one previously owned by it and which had been destroyed by fire. The defendant city taxed the power plant used by the plaintiff and the company brought an action in equity to declare the tax void. In affirming judgment below for plaintiff, the court did not consider the history or the purpose of the gross receipts tax, but centered its attention exclusively upon the word "owned", which it held was frequently used in a loose sense "to designate a great variety of interests in property" (p. 253).

Inasmuch as the decision turns solely upon the meaning of the word "owned" as used in the Wisconsin statute, and article XIII, section 14 of the California Constitution does not employ the term at all, we submit that the Wisconsin decision has no application to the facts of the instant case.

The court, however, was not at all unanimous in its opinion, and Mr. Justice Marshall dissented, saying at pages 257-8:

> "I take no exception to the view that in case of a license fee system of taxation as to specific property, as that of a railway company, made to take the place of the general system applicable to other property, the law in that regard should be liberally construed, if necessary, so as to include all property which would be taxable by such general system to the railway company if it were not for such license method. To go further, however, and include property taxable to other persons under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legislation.
>
> "I may not get the judicial idea intended to be expressed in the opinion of the court; but to avoid one doing violence to words under the guise of construction I must conclude that my brethren do not claim that subd. 14, sec. 1038, Stats. 1898, was intended to do more than render property, which would in the absence of the statute be directly taxable to the railway company, in lieu thereof taxable indirectly under the license fee system. To that extent, it seems, the law voices its purpose too plainly to admit of any attempt to construe it. If the court had viewed the case presented in that light and determined first the question of whether the power plant, of which the railway company was a mere lessee, would in the absence of the fee system of taxing its property be taxable to it, the question of whether the word 'owned' as used in the law means more than absolute ownership would have been immaterial. Passing over the fundamental question, as it seems the court did, the case was made to turn wholly on the mean-

ing of the word 'owned'. I assume that no one will question that, if it were not for the section of the statute under consideration, realty circumstanced as that in question would be taxable to the landlord under sec. 1043; and that if the former section were repealed it would be so taxable. Then the court has extended subd. 14, sec. 1038, beyond its legitimate scope by applying it to property not taxable by such system to the railway company before the enactment.

"The mere statement of those propositions, to my mind, as before indicated, clearly shows that a mistake has been made * * *."

Counsel for respondents in the *State Board Cases* last July relied on the same decisions as were previously presented to the Circuit Court of Appeals. Therefore, in [illegible] instances, we have the direct comment of the California Supreme Court upon the application, as viewed by that court, of the cases relied on by the Circuit Court of Appeals. The California court took the position that Mr. Justice Marshall's dissenting opinion was more logical than that of the court, saying at 74 California Decisions 96, 101:

"By a divided court it was held that, under a liberal construction, the word 'owned,' as used in the statute, might be satisfied by something less than absolute and entire ownership, and that a leasehold interest was not subject to local taxes. Mr. Justice Marshall, dissenting, was of the view that the court should have gone only so far as to hold exempt all property which would be taxable by the general system of taxation to the railroad company if it were not for such license method. 'To go further,' he says, 'and include property taxable to other persons

under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legislation.'" [See Appendix "I", pp. 10-11.]

City of Superior v. Allouez Bay Dock Co., 166 Wis. 76, 164 N. W. 362, cited without comment by the Circuit Court of Appeals [R. 84], was a case arising out of a suit brought by the City of Superior to collect an income tax from a company owning an ore dock and railroad tracks in connection therewith, which at all times had been leased to an operating railroad. By the Wisconsin income tax statute "income derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes" (page 81) were exempt from income tax. The defendant claimed that it was a railroad paying such a tax and therefore exempt. Judgment below for defendant was affirmed by the state Supreme Court. As stated by the California Supreme Court in *Pac. Tel. & Tel. Co. v. State Board of Equalization*, 74 Cal. Decisions 96, 101, the question actually raised in the case was "whether or not the defendant dock company was, in legal effect, a railway company under the terms of the statute, and hence not subject to an income tax". [See Appendix I, p. 11.]

In *People ex rel. Collector v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956, the Illinois court had before it a law (Hurd's Illinois Statutes, 1919, p. 1833) which required a railroad to return a schedule "showing the property *held* for right of way * * *" and providing that such property should be assessed and taxed to the railroad as "railroad track". The sole question, therefore, discussed by the Illinois court was whether land not

owned but leased by the railroad for right of way purposes came within the constitutional definition of "railroad track".

In considering this case, the California court in *Pac. Tel. and Tel. Co. v. State Board of Equalization*, 74 California Decisions 96, at page 102, said:

> "The cases from Illinois (*e. g., People v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956) hold that, for the purpose of taxation under the peculiar statute of that state, a railroad company is the owner of land occupied by it for its right of way, without regard to where the fee title to the land rests." [See Appendix I, p. 11.]

That the Illinois court would not have reached a similar conclusion upon a statute or constitutional provision using the language of article XIII, section 14, to-wit, "their • • • property" can be seen from the cases cited from Illinois (V. B. 1, hereof), in which the Illinois Supreme Court, both before and after the decision in the *Wiggins Ferry Case*, held that such language designated absolute ownership and negatived the argument that it included also that which was leased.

People v. Terre Haute and Western Railway Co., 256 Ill. 591, 100 N. E. 173, was also a case in which the Illinois court construed what was included within the statutory definition of "railroad track", and the argument above directed to the *Wiggins Ferry Case* is also applicable thereto.

We submit, therefore, that the only authorities cited from other states and relied upon by the Circuit Court of Appeals in its decision below that "operative property"

as defined in Article XIII, section 14 of the California Constitution included *leased property* were all rendered upon statutory provisions absolutely dissimilar from the language of article XIII, section 14, and in the Illinois cases any presumption that the Illinois court would hold as did the Circuit Court of Appeals on the language of article XIII, section 14, is controverted by the fact that that court has, subsequent to the decisions relied upon by the Circuit Court of Apeals, held that the language identical with that in issue here excluded all except the property *owned* by the person claiming advantage of the constitutional provision.

It therefore appears that the true meaning of article XIII, section 14 of the California Constitution as viewed in the light of the historical intentions of its authors, of the grammatical construction and apparent meaning which those authors employed, subsequent construction by the California Legislature and Railroad Commission, and finally, by the California Supreme Court in a line of decisions beginning shortly after the enactment of the constitutional provision and running down to cases decided subsequent to the filing of the bill of complaint in the instant case in which the California court passed upon the precise point of law involved here and commented upon the facts of the present case, is to exclude from the term "operative property" all except that *owned* and *used* by the public utility. The authorities relied upon by the Circuit Court of Appeals, when analyzed, are not in point in the present discussion, and, therefore, we submit, that the Circuit Court of Appeals erred in construing, as a matter of state law, the meaning of article XIII, section 14 of the Constitution. Even though this court should

hold that our argument in all other regards herein is not sound, we submit that upon this final substantive question the decision of the Circuit Court of Appeals should be remanded, with directions to dismiss upon the ground that the tax complained of was properly levied.

Conclusion.

In ending our long and probably tedious brief, the only excuse for which lies in the extremely complicated constitutional and legal question presented to this court and its importance to the fiscal system of your petitioner county, we again desire to emphasize the effect of an affirmation by this court of the decision of the Circuit Court of Appeals. Not only would it exempt from local taxation tremendous sums invested in property of no different character than any other property except that of the incidental lease to a public utility, as the fact of the lease of an office building to a public utility changes in no whit or degree the protection which that building, and through it, its owner, receives from your petitioner county and the respective governmental agencies within which it is included, but it would, in effect, be placing the public utility corporations in the position of a favored class who may go upon the market and lease or rent buildings, typewriters, automobiles and what not at a figure below their current market rental upon the understanding that, at no cost to the utility, these various articles will by such lease or rental agreement be exempt from all local taxation.

We further desire again to call to the attention of this court that the effect of approving the decision of the Circuit Court of Appeals in taking federal jurisdiction over

a case where the only possible federal question arises not out of a direct violation of the fourteenth amendment but of the doing of an act alleged invalid *only under state law* would result in the transfer to federal courts, and eventually to this court, of jurisdiction over every case of state taxation where it was alleged, with appropriate pleadings as to the federal question, that the tax *was invalid by virtue of state law*. This, we contend, is, after all, the paramount issue in this case.

Our argument herein has been based upon five practically alternative grounds. First, that the allegations of the bill of complaint fail to state a substantial federal question and thus are insufficient to show jurisdiction in the District Court. Second, that the allegations of the bill of complaint, assuming that they show federal jurisdiction, do not set forth grounds for equitable relief. Thirdly, that no double taxation or discrimination of any kind is presented *in fact* in the tax complained of herein. Fourth, that inasmuch as there was at no time a hearing on the question of *fact* as to double taxation and discrimination and the allegations of such were controverted by petitioners' answer to the bill of complaint, the Circuit Court of Appeals erred in *passing* upon a question solely of state law. Finally, that the Circuit Court of Appeals, assuming that it had jurisdiction of the case and did not err in passing on a question of state law prior to determination as to whether *facts* were present which could raise a federal question, *decided* the point of state law involved incorrectly as the history, language, subsequent legislative interpretation, and judicial con-

struction in the state courts of article XIII, section 14 of the California Constitution all showed that the true meaning of "operative property" thereunder included only that *owned* and *used* by the utility.

Respectfully submitted,

EVERETT W. MATTOON,
County Counsel,
and
W. SUMNER HOLBROOK, JR.,
Deputy County Counsel,
Attorneys for Petitioners.

APPENDIX I.

(74 California Decisions 96.)

[Page 96]:

S. F. No. 12535. In Bank. July 2, 1927.

The Pacific Telephone and Telegraph Company (a Corporation), Applicant, v. State Board of Equalization of the State of California and John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley, as members of and constituting the said State Board of Equalization, Respondents.

[Page 97]:

Application for writ of mandate prayed to be directed to the State Board of Equalization, to compel the listing of certain leased property as operative. Writ *denied*. Preston, J., *dissents*.

For Petitioner—Pillsbury, Madison & Sutro; Oscar Lawler; Lawler & Degnan, of Counsel.

For Respondents—U. S. Webb, Attorney-General; Frank L. Guerena, Deputy Attorney-General; Everett W. Mattoon, County Counsel; J. A. Tucker, Deputy County Counsel; Dixwell Pierce, Amicus Curiae.

This application for a writ of mandate involves the question whether or not improved real property, leased by a telephone company and used by it in the operation of its business in this state, is subject to local taxation. Pursuant to section 3665c of the Political Code the Pacific Telephone and Telegraph Company, in April of this year, filed with the State Board of Equalization its annual report, showing in detail (among other items) all its property which it claimed came within the definition of operative property. It included in the report improved real

property located in the cities of San Francisco, Oakland and San Jose, which, while used exclusively in the operation of its telephone business, is not owned by the Telephone Company, but by others, and leased to it. The several county assessors protested against the inclusion of these properties as operative, on the sole ground that they are leased, and not owned, by the Telephone Company. The Board of Equalization, after due hearing, advised the Telephone Company that it has sustained the protests of the assessors on the ground specified. This application for a writ of mandate is to compel the Board to reverse its ruling and to list the leased properties as operative, thereby rendering them exempt from local taxation.

Prior to 1910 the Constitution of California provided that all property in the state, not exempt under the laws of the United States, should be taxed in proportion to its value, to be ascertained as provided by law. Under the amendment of that year, providing for the separation of state and local taxation, and for taxing certain public service corporations for state purposes only, it is now provided that all property in the state, except as otherwise in the Constitution provided, not exempt under the laws of the United States, shall be taxed according to its value, to be ascertained as provided by law, "or as [in the Constitution] provided", and that "in lieu of all other taxes and licenses, state, county and municipal," all telephone and other enumerated companies "shall annually pay to the State upon their franchises * * * poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their

[Page 98]:

business in this State," a tax measured by a given percentage of gross receipts, equal, in the case of telephone companies, to five and one-half per cent upon the gross receipts from operation within the state. (Const., art. XIII, secs. 1 and 14 [a].) The underlying theory of taxation in this state has always been that the owner of property subject to taxation must pay the tax. It needs no citation of authority to that effect. Our whole scheme of taxation rests upon that theory. (Pol. Code, sec. 3628.) Petitioner is here contending, however, that in the case of the "operative" property of companies liable to taxation for state purposes only, it is unity of operation in the use of property, regardless of ownership, and not ownership, that determines who shall pay the tax. It takes the position that, as the leased buildings are used in its business, and as part of its telephone system, they are operative property and contribute to its revenues, and, consequently, to the amount of its taxes, in no way different from property owned by it, for which reason it contends that it should not pay the gross receipts tax to the state and also pay the local taxes on property the use of which yields the gross receipts. The false quantity in its reasoning is that petitioner will not be liable for the tax if the leased property be locally assessed. No matter how we may decide the controversy, the amount to be paid by the petitioner as its state tax will not be affected. It must pay the fixed percentage on its gross receipts. Neither will the amount of local taxes which the petitioner is required to pay by the tax laws of the state be affected. For the usual purposes of taxation this state does not recognize any segregation of interest between a leasehold and the

reversion. The whole tax is assessed against the owner of the fee, and the tax, in the absence of any agreement between the lessor and the lessee, will be paid by the owner. If the petitioner in this case is compelled to pay the local tax it is because it has voluntarily agreed with the lessors to do so.

The question involves a construction of the section of the Constitution. It is undoubtedly true that property used in the public service frequently acquires a value in the use which is something greater than the value of the property not engaged in such use. By the systemization and unification of such properties in use they in the aggregate acquire a special value by virtue of this unity of use. It is on the theory that a fair tax upon gross earnings of the utility bears such a relation to the values of these properties under their unity of use as to justify a tax upon revenue as being a legal and commutated, or substituted, tax for other taxes which previously were or might be levied that the courts have sustained the present method of taxing public service companies. (*Pacific Gas and Electric Co. v. Roberts*, 168 Cal. 420, 425, 143 Pac. 700.) Petitioner cannot claim that before the change in the method of taxing public service companies went into effect it was liable for taxes levied on leased property occupied by it and used in its business. This court has always considered the present form of taxing such companies to be in fact what it purports to be, namely, a tax upon the property of the utility as it is described in the Constitution. (*Pullman Co. v. Richardson*, 185 Cal. 484, 489, 197 Pac. 346.) We are now asked to enlarge section 14, supra, beyond its commonly accepted scope, and to place upon its provisions an interpretation which we be-

lieve the entire context of the section does not warrant. We may concede that it is the use of the property that determines whether or not it is "operative" in character [Page 99]:

(*San Bernardino v. State Board of Equalization*, 172 Cal. 76, 79, 155 Pac. 458); but it is "use by the owner" that fixes its status. We are of the view that the provision in section 14 that, in lieu of all other taxes and licenses, telephone and other companies shall annually pay to the State upon *their* franchises, etc., and other property, or any part thereof used exclusively in the operation of *their* business, a tax measured by a given percentage of gross receipts, limits the property on which such tax must be paid to property owned by the companies, and cannot be held to include leased property not owned by them. In addition to what we accept as the plain meaning of the constitutional provision, through the use of the pronoun "their" in pointing out the property liable for the substituted tax, we cite, in support of our conclusion, the reason for and history of the adoption of the amendment (see *San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 135 Pac. 971), circumstances connected with its adoption, and legislative action following its ratification. While such matters are not conclusively binding on the court, they are of assistance in the present case, for they confirm our view as to the proper construction to be applied in the case.

While the constitutional amendment of 1910 worked a radical change in the system of taxation in this state, the purpose of which was to divide the subjects of state and local taxation by imposing upon persons and corporations engaged in certain callings the obligation to pay taxes to

be applied exclusively to state purposes, the tax imposed by article XIII, section 14, is not radically different from the tax provided by the Constitution before the amendment. Under the old system, the property and franchises of the companies, now specially set apart, were taxed for both state and local taxes. The amendment merely creates a *new method of taxing such property* and franchises, and appropriates the revenue so raised to state purposes solely. (*San Francisco v. Pacific Tel. & Tel. Co.*, supra.) The tax so imposed remains essentially a property tax. (*Pullman Co. v. Richardson*, 185 Cal. 484, 487, 197 Pac. 346.) In submitting the proposed change to the people in 1910, the commission on revenue and taxation, in its analysis of the provisions of the constitutional amendment, contained in its report (p. 18), says (italics added): "It [the amendment] leaves the old sections unchanged, except in so far as they are modified by the new section • • • The amendment provides that certain taxes on the *property* of certain classes of companies, as named and described below, shall be exclusively for state purposes. *It leaves the old system of ad valorem taxation on property in general, other than that of the classes named*, for the use of the counties, cities, school and other districts. • • •

"The taxes reserved for the state are:

"(1) On the operative *property of* railroad companies, etc.

"(2) On the *property of* sleeping car • • • etc., companies, etc.

"(3) On the *property of* express companies, etc.

"(4) On the *property of* telegraph and telephone companies, etc.

"(5) On the *property of* all light, heat and power companies, etc.

"All the non-operative property of the above corporations is left subject to local taxation."

It seems most reasonable to say that the commission, in explaining to the voters the nature of the change to be brought about by the new system of taxation, used, and expected the people to understand, the expression "prop-
[Page 100]:
erty of" in the plain and ordinary sense of "belonging to", and as indicating ownership in the public service companies which at that time were assessed for and were compelled to pay local as well as state taxes on all property owned by them. Property not owned by the companies, but leased to them, was not assessed to them, and they were not required by law to pay taxes, state or local, thereon.

When, following the adoption of the amendment, it enacted the necessary procedural statutes for carrying the new scheme of taxation into effect (see Stats. 1911, p. 530), the legislature declared (see Pol. Code, sec. 3665b) that the term "operative property", as used in the code and as applied to telegraph and telephone companies doing business in the state, shall include [subd. (d)]: "The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings." In subdivision (e) occurs the following: "• • • the opera-

tive property of the companies enumerated in this section, shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section three thousand six hundred sixty-four a of this code." Because of the occurrence of the phrase "exchange and other buildings *used* in the telegraph and telephone business" in subdivision (d), and of the general definitions last quoted (subd. [e]), petitioner argues that the legislature has made unity of use in the business the test of whether or not the property is operative. We need not discuss this contention further than to say that, if the definition of "operative property" in the code is not in harmony with the Constitution, the provision in the Constitution must prevail. (*San Diego etc. Ry. v. State Board*, 165 Cal. 560, 565, 132 Pac. 1044; *Lake Tahoe Ry. etc. Co. v. Roberts*, 168 Cal. 551, 556, 143 Pac. 786.) But we are of the view that, considered in their entirety, the code sections are in harmony with the Constitution on this matter. The next succeeding section (3665c) makes it mandatory upon each of the public service companies, when filing its annual report to the State Board of Equalization, to report in such detail as the board shall prescribe "all of *its property* [italics added] in this state which comes under the definition of operative property" in section 3665b. By another provision (sec. 3668c) the legislature made the taxes for the support of the state, under the provisions of the Constitution (supra) and the sections of the Political Code enacted to carry them into effect, a lien upon all the property and franchises of every kind and nature *"belonging to"* the companies subject to taxation for state purposes, the tax to have the effect of

an execution duly levied against "all property of the delinquent". The primary meaning of the phrase "belonging to" is "to be the property of". (7 C. J. 1039.) The judgment is not satisfied, nor the lien removed, until the tax, penalty and costs are paid, or the property sold for payment. We, therefore, conclude that, in order that the companies whose property is subject to taxation for state purposes may claim an exemption of their operative properties from local assessment and taxation, it must [Page 101]:
first appear that the property belongs to the claimant, that is, in the sense that it is owned by it.

The fact that the leased buildings contribute to the company's receipts is immaterial, unless such property comes within the constitutional definition of the property set aside for taxation for state purposes. (*Lake Tahoe Ry. etc. Co. v. Roberts*, supra, p. 555.) The further contention that, unless it be held that leased property may be operative property, it will be subjected to double taxation, and that a "serious constitutional question" will arise, is answered by the decision of this court in *Bank of California v. Roberts*, 173 Cal. 398, 403, 160 Pac. 225. If petitioner has voluntarily assumed a contractual obligation to pay a tax it is not required by law to pay, it should not be permitted to use that fact as the basis for a claim of double taxation.

We have examined the authorities relied upon by the petitioner to support its claim for an exemption of the leased buildings from local taxation. Almost the precise question submitted by the application now before us was considered in *Southern California Telephone Co. v. Hopkins*, 13 Fed. (2d) 814, in a case involving certain parts

of "talking sets" leased by the Telephone Company from another corporation and used as integral parts of certain instruments in the operation of the company's business. The Circuit Court of Appeals held that unity of use, and not ownership, determined whether or not the property was properly classed as "operative" under the provisions of the California Constitution. The cause has been transferred to the Supreme Court of the United States, where it now awaits final decision. We find ourselves in direct disagreement with the construction adopted by the federal court, because of what we believe to be the plain intent and meaning of the constitutional provisions. In *Merrill Ry. & L. Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686, the court was construing a statute subjecting those engaged in operating street railways to a charge graduated upon their gross revenues, in lieu of other taxation, and which provided that other property "owned and actually and necessarily used by such person, company or corporation in the operation of its business", should be exempt from taxation. By a divided court it was held that, under a liberal construction, the word "owned", as used in the statute, might be satisfied by something less than absolute and entire ownership, and that a leasehold interest was not subject to local taxes. Mr. Justice Marshall, dissenting, was of the view that the court should have gone only so far as to hold exempt all property which would be taxable by the general system of taxation to the railroad company if it were not for such license method. "To go further," he says, "and include property taxable to other persons under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legisla-

tion." In *City of Superior v. Allouez Bay Dock Co.*, 166 Wis. 76, 164 N. W. 362, unity of use of the property taxed does not appear to have been considered, the question being whether or not the defendant dock company was, in legal effect, a railway company under the terms of the statute, and hence not subject to an income tax. Neither does that question appear to have been involved in *City of Detroit v. Detroit Manufacturers R. R. Co.*, 149 Mich. 530, 113 N. W. 365. The question was whether or not the defendant was a railroad company organized under the general railroad law, or to be considered a street [Page 102]:

railway. The cases from Illinois (*e. g., People v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956) hold that, for the purpose of taxation under the peculiar statute of that state, a railroad company is the owner of land occupied by it for its right of way, without regard to where the fee title to the land rests. We deem it unnecessary to cite the further authorities relied on by petitioner. Other than the two first above cited, they deal with questions so unlike those involving our own Constitution and statutes that they are useful only by way of illustration. After reading all these decisions, we are still of the view that this court is not justified in extending the provisions of section 14 of article XIII of the Constitution, providing a substituted tax for public service corporations, by applying it to property not taxable to them by our system of taxation before the amendment was adopted.

During the argument, the suggestion was offered that relief, to a certain extent, might be accorded to the petitioner through regarding its interest in the leased properties as operative property, the value of such interest to

be considered as proper deductions by the respective local assessors when making the assessments against the owners. The law makes no specific provision for separate assessment of leasehold interests to the lessor and reversion to the owner. While it has come to be regarded as settled law that, where the state or other public authority owns the reversion, the private owner of a leasehold interest is not exempted from paying the tax upon his interest because the interest of the state is not taxable, in the ordinary case the value of the leasehold is included in the value assessed to the owner of the fee. (*San Pedro etc. R. R. Co. v. Los Angeles*, 180 Cal. 18, 23, 179 Pac. 393.) Assessment of possessory rights under leases for the extraction of oil and like substances from the land has been held to be proper, because of their essential difference from the ordinary possessory interests under leases. (*Mohawk Oil Co. v. Hopkins*, 196 Cal. 148, 236 Pac. 133.) In ordinary cases, however, the whole property is taxed to the owner, and which party shall bear the burden is not a matter of public concern.

The respondent Board of Equalization, having correctly ruled that the property here in question is not subject to taxation for state purposes, the application for the writ is denied.

WASTE, *C. J.*

We concur:
CURTIS, *J.*
SHENK, *J.*
LANGDON, *J.*
SEAWELL, *J.*

I dissent: (Opinion to be filed.)
PRESTON, *J.*

APPENDIX II.

(74 California Decisions 102.)

S. F. No. 12536. In Bank. July 2, 1927.

Southern California Telephone Company (a Corporation), Applicant, v. State Board of Equalization of the State of California and John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley, as members of and constituting the said State Board of Equalization, respondents.

Application for writ of mandate prayed to be directed [Page 103]:
to the State Board of Equalization, to compel the listing of certain leased property as operative. Writ *denied*. Preston, J., *dissents*.

For Petitioner—Pillsbury, Madison & Sutro; Oscar Lawler; Lawler & Degan, of Counsel.

For Respondents—U. S. Webb, Attorney-General; Frank L. Guerena, Deputy Attorney-General; Everett W. Mattoon, County Counsel; J. A. Tucker, Deputy County Counsel; Dixwell Pierce, Amicus Curiae.

This application for a writ of mandate involves the precise question this day decided in Pacific Telephone and Telegraph Company v. State Board of Equalization (S. F. No. 12535), which is whether or not improved real property leased by a telephone company, and used by it in the operation of its business in this state, is subject to local taxation.

Pursuant to section 3665c of the Political Code the Southern California Telephone Company, in April of this year, filed with the State Board of Equalization its annual report, showing in detail (among other things) all its

property which it claimed came within the definition of operative property. It included in the report certain real property, together with the improvements thereon, situate in the city of Los Angeles, and not owned by it, but leased to it, and used exclusively in the operation of its telephone and telegraph business in said city. The county assessor of Los Angeles county protested against the inclusion of this property as operative property, on the sole ground that it was leased and not owned by the Telephone Company. The Board of Equalization, after due hearing, advised the Telephone Company that it has sustained the protest of the assessor on the ground specified. This application for a writ of mandate is to compel the Board to reverse its ruling and to list the leased property as operative.

For the reasons and on the grounds stated in the decision in Pacific Telephone and Telegraph Co. v. State Board of Equalization, supra, the application for a writ is denied.

WASTE, *C. J.*

We concur:

CURTIS, *J.*
SHENK, *J.*
LANGDON, *J.*
SEAWELL, *J.*

I dissent:

PRESTON, *J.*

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IN THE

SUPREME COURT

OF THE

UNITED STATES

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; E. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic,

Petitioners,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

Petition for Rehearing or Modification of Decree.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned attorneys for petitioners respectfully desire to file this petition for a limited rehearing or modification of the decree rendered in the above entitled matter on the 3rd day of January, 1928.

Basis of Petition.

This petition is based upon our belief that a reading of the decision previously rendered herein shows that this court has erred, due to our fault in presentation of the

case, in two regards which are the sole grounds of this application:

(1) The gross receipts tax paid by telephone companies *since it varies in proportion to the property owned by them must be a property tax thereon.* It cannot be a *property tax* on other property any more than it can be a *property tax* on salaries paid employees.

(2) Section 14 of Article XIII of the California Constitution had been interpreted by the state courts prior to this decision in such a manner as clearly to necessitate a construction of operative property by this court as that *owned by* the telephone company.

The portion of the decision relied upon in both regards is set forth in the concluding paragraph appearing on page 8 of the pamphlet opinion and reads as follows:

> "We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. *Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise. Without any authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation.*" (Our italics.)

This court has quite properly interpreted a question of state law contrary to our position, if:

(1) It is necessary to reach such a determination to avoid "serious questions under the Federal Constitution."

(2) There is no "authoritative holding" by the state courts which precludes this court from giving a

construction to Section 14 of Article XIII of the California Constitution contrary to that urged by respondents.

We earnestly and respectfully believe that neither assumption is correct.

I.

NO "SERIOUS QUESTIONS UNDER THE FEDERAL CONSTITUTION" WOULD ARISE OUT OF A CONSTRUCTION OF OPERATIVE PROPERTY OF TELEPHONE COMPANIES AS LIMITED TO THAT OWNED BY THEM.

The serious question under the Federal Constitution which the court seems to anticipate is set forth on page 7 of the pamphlet decision, as follows:

> "If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while a competitor with equal receipts, by paying the same amount, might absolve from local assessment property of very large value."

Swayed solely by the fear that a practical application of petitioners' theory would result in an unconstitutional discrimination between utilities, this court, as we read its

opinion, rendered its decision on the question of state law not because of the apparent meaning of Section 14, *but in spite of it.* We respectfully submit that this court in so doing anticipated a contingency which can never occur.

This court must have misinterpreted the method by which respondents' gross receipts tax is computed, as we earnestly believe that it is mathematically demonstrable that no practical or legal discrimination can result from petitioners' contention, *provided the method of computation of public utility gross receipts is thoroughly presented to the court.*

The respondents, as public utilities, are subject to the jurisdiction of the California Railroad Commission and the Interstate Commerce Commission. Over ninety-six per cent of their gross operative receipts, upon which the tax of five and a half per cent is levied, is derived from rates or service charges established by these two commissions.*

It is evident that the method used in determining these service rates must almost entirely determine respondents' gross receipts and respondents' gross receipts tax. Although these service rates are in fact very numerous, assuming for sake of simplicity a single flat service rate, we have a mathematical equation as follows:

R × number of services = gross receipts.

Analyzing R through the medium of the reports of the Commission (see pet. br. pp. 110-120), we find it is an arbitrary figure which, when multiplied by the number

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* These were estimated for the year 1931 by the Railroad Commission in Re Southern California Telephone Company, 35 R. C. D. 731, 742, to be:

Exchange Lines,	$11,455,000.00	—	81.5%
Toll Service,	400,000.00	—	3 %
Miscellaneous,	482,000.00	—	3.5%
	$13,797,000.00		

of services (or service connections), will result in a product large enough, after deducting operating expenses therefrom, to produce *a fair net return upon the capital invested in property owned by the company.* (Counsel for respondents admitted at the oral argument the correctness of our analysis in this regard.)

Expressed mathematically, the formula is:

$$R = \frac{(X\% \times \text{owned property}) + \text{operating expenses}}{\text{estimated number of services}}$$

Applying the above formula to a situation where the value of the owned property or rate base was $100,000, the rate of net profit allowed was 5%, operating expenses were $100,000, and the number of services or subscribers was 10,000, we would then have a service rate or R of $19.50. Increasing the owned property or rate base to $200,000 would increase R to $[illegible].00. *Likewise the gross receipts would increase from $[illegible]000 to $[illegible]0,000 and the gross receipts tax of a telephone company, computed at 5½%, from* ~~$[illegible] to $[illegible]~~ $5775 to $6,05[illegible]

The gross receipts tax, then, other matters remaining constant, increases and decreases with mathematical precision with the property owned by the utility. On page 7 of its pamphlet opinion, this court approved the decision of the California courts that the gross receipts tax is "essentially one on property." *If this be so, on what property can this tax rest except that which increases or decreases the tax in strict accordance with its value?*

It is true that, if other factors vary, the gross receipts tax will also increase or decrease. In the above case if the operating expenses, because of higher salaries, had increased from $100,000 to $200,000, with no increase

in the rate base or owned property, R would have likewise increased from $12.00 to $14.00. *Can it logically be said that the increased tax which the utility must pay in such a case is a property tax upon the increased salaries of its employees? The answer is patent.*

Rentals of leased property under the rate-fixing methods followed by both the Interstate Commerce Commission and the California Railroad Commission are treated in identically the same manner as other operating expenses. It can not logically be said that the gross receipts tax under such a condition represents a tax on such leased property any more than on the salaries of the employees, *for both are treated alike.* Indeed, we respectfully submit that to hold the gross receipts tax to be a tax on the leased property is one degree more remote and illogical than to hold it a property tax upon the salaries paid employees, because the essence of the respondents' case is that the property taxed by the gross receipts tax, and therefore removed from local taxation, is not the rental but that for which the rental is paid, or the leased premises.

The instance cited of a corporation with title to half in value of its operative property, the remainder being leased, paying twice the rate required of another corporation operating the same amount of property and having equal receipts but leasing nothing, could not occur. *Two corporations under such circumstances would not have the same gross receipts unless the impossible happened and the operating expenses of the company leasing half increased exactly the amount necessary to offset the decrease in net return caused by the decrease in value of the owned property.* Slight inequality of treatment of

utilities necessarily results from the use of gross receipts as a measuring stick for a property tax. This is a defect inherent in the gross receipts method of taxation. It does not arise from any vice in the position of petitioners or respondents herein. This is shown by reference to the above cases where the two companies both with the same invested capital and leasing no property, one having a higher operating expense than the other, paid respectively 6.6% and 7.7% tax on its owned property. Such a fluctuation was anticipated by the Commission on Taxation and Revenue when it said in its 1906 report at page 159: (Appendix to Journals of Senate and Assembly, California, Thirty-seventh Session, 1907, Vol. 2, Item 6.)

> "If a road (railroad) does more business this year than last, it buys more coal, pays more wages, *and under this plan would pay more taxes.*" (Our italics.)

Assuming for sake of argument that inequalities would in fact result from petitioners' contention, it does not mean that the owned property is bearing such an increased burden as would appear at first glance. A company which could secure the same gross profits as its competitor with only half of its competitor's investment must of necessity have a tremendous franchise value over and above that owned by its competitor.

This is not a new situation or one unknown to this court. In *Adams Express Company v. Ohio*, 165 U. S. 194, this court pointed out that in that case property valued at $23,400 and consisting of wagons, horses, safes and the like had brought in revenues aggregating $275,446.00 in a single year. This court, through Mr.

Chief Justice Fuller, in upholding the Ohio gross receipts tax against an attack on the ground that the express company was taxed thereunder on a valuation of $499,377.60 instead of $23,400 said at pages 221-2:

> "No more reason is perceived for limiting the valuation of express companies to horses, wagons, and furniture than that of railroad, telegraph, and sleeping car companies to roadbed, rails, and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, *whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation the instance of these companies as the others.*" (Our italics.)

The instance of the telephone company which leased everything it used and thereby released no property from taxation by reason of the payment of the gross receipts tax is simply an illustration, stretched far beyond any actual possibility, of a corporation which had a franchise value raised to the nth degree, inasmuch as it was enabled to conduct a tremendous business without the investment of a dollar of its own capital.

The inclusion of the franchise element in the property owned is the explanation of the practical difficulties which this court erroneously foresaw. A comparison of the instant problem to that raised by increased salaries or other items of operating expense having nothing to do with the lease problem shows the utter futility of holding the gross receipts tax a property tax upon anything except that included in the rate base (and franchises

are so included) which, as we have shown above, excludes all leased property. We respectfully submit that respondents' interpretation of operative property will not raise any "serious questions under the federal constitution." Therefore the reason given by the court for straining the clear and apparent meaning of Section 14 of Article XIII should have no weight.

II.

THIS COURT ERRED IN DECIDING THAT THERE WAS NO "AUTHORITATIVE HOLDING" BY THE STATE COURTS AS TO THE MEANING OF SECTION 14.

On page 5 of the pamphlet opinion, this court said:

> "No ruling of the California Supreme Court authoritatively determines whether personal property leased by a telephone company and actually used for operating purposes is relieved from local taxation by payment to the State of the prescribed percentage of the lessee's gross receipts. July 2, 1927,—after the decision below—that court handed down an opinion which declared leased improved real estate, although actually used as operating property, was subject to local taxation. *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96. But rehearing was granted and this vacated 'the previous opinion and judgment and set the whole matter at large.' *Miller & Lux Incorporated v. James*, 180 Cal. 38, 48."

Apparently this court interpreted our argument in respect to the decisions of the state courts as being predicated upon a contention that the instant case was controlled alone by the *State Board Cases*, in which the decisions had been vacated by the order granting rehearing.

We intended to emphasize our position that these decisions, although technically vacated and of no binding effect, served as nothing else could to show what was the manner of thinking on this precise point by the California Supreme Court. *As was said by one of the learned justices at the oral argument in this case, there is no reason to believe that the California Supreme Court, when this question comes before it, will not reaffirm the position which it took so firmly last July.*

However, the *State Board Cases* were simply the culmination of a long line of cases which by their decisions and language required a determination that "operative property" included only that which was owned by the operating utility. These cases emphasized, to summarize them briefly, the fact that the new form of taxation was a substitute method of taxing the same property which had previously been taxed to the utilities prior to the adoption of Section 14 in 1910. As we view it, this could only be the owned property, since prior to 1910 public utilities had not paid taxes upon property which they leased.

Pacific Gas and Electric Co. v. Roberts, 168 Cal. 420, 425 (1914);
Union Tank Line Co. v. Richardson, 183 Cal. 409, 413-414 (1920).

Due to the fact, that since the oral argument, we have found further corroboration of our contention, we desire to discuss one further case in detail. In *Pacific Gas and Electric Co. v. Roberts*, 176 Cal. 183, (1917), plaintiff was a California corporation engaged in the sale of gas and electricity. The Suburban Light and Power Co. was operating as an independent company. The gross receipts of the Suburban Light and Power Co.

were $188,401.60 which were the results of the sale of gas and electricity by said corporation. Large quantities of gas and electricity were purchased from the plaintiff for the sum of $52,717.99. Plaintiff's gross receipts were $7,816,313.12, but it in turn had purchased electricity in the amount of $972,293.52 from independent companies. The State Board of Equalization, under Section 14, had assessed to plaintiff and to the Suburban Light and Power Co. a tax at the rate of 4% upon the gross receipts of both companies without allowing any deduction for the amounts paid upon the sales of gas and electricity purchased by the Suburban Company from plaintiff or purchased by plaintiff from independent concerns. In other words, the plaintiff insisted that double taxation resulted from the computation of taxes upon the same property, to-wit, the plant of the Pacific Gas and Electric Co., the Suburban Light and Power Co., and the properties of the independent companies. In upholding the position of the State Board of Equalization, the court said at pages 188-9:

> "It thus appears and has been definitely decided by this court that the tax, whatever its scientific essence, *is levied upon property created in part by the unity of use of other property. There is a unity of use in the distribution of gas and electricity sold to its consumers* by such a corporation as the Pacific Gas and Electric Co., *whether those commodities be produced in its own retorts and by its own generators or purchased ready-made* from other corporations. The tax *might* be levied upon the gross earnings (as indeed it is in some states), but we see nothing to prevent its ascertainment by calculating a certain per cent of the 'gross receipts from operation.' Either method would be a 'commutated or substituted' tax upon *properties* which have acquired

peculiar and special worth because of their 'unity of use'." (Our italics.)

In 1922 there was proposed to the people of California as Proposition 15, a constitutional amendment which would have reversed the decision of the court in the above case. The amendment in this regard read as follows:

> "provided, that whenever any company taxed under the provisions of this section shall pay to any other such company for any commodity furnished by the latter, any money which shall upon its receipt add to and become a part of such other company's gross receipts from operation as herein defined, said sum so paid shall be deducted from the gross receipts from operation of the company paying same and the tax as herein provided shall be computed on the net amount of such company's receipts remaining after such deduction."

The proponents of this constitutional amendment in their argument to the voters, appearing at page 87 of the official pamphlet distributed to the electorate at the polls in 1922, said concerning this provision:

> "This amendment, however, goes just a little further. *It clears up two cases of double taxation by those who contribute to state support.* One of these has to do with the sale of the product of a company, which sells to another company for retailing, as happens sometimes in dealing in electric power. *That power should be taxed but once.*" (Our italics.)

This amendment was defeated. Since there was no opposing argument filed, it must be deemed that the people of California considered and decided against the proposed amendment upon the argument so used.

It is to be noted that this argument was identical with that employed by respondents in this case, to-wit, double taxation.

The California Supreme Court has held in the ***Roberts Case*** that Section 14 requires that a public utility selling its product must include the proceeds thereof in its taxable gross receipts even though the buyer is also a public utility purchasing for resale the proceeds of which resale are to be included in its taxable gross receipts. *This decision the people of the State of California have solemnly ratified as not only the meaning but the desired meaning of Section 14.*

No one can doubt but that the rule of *Pacific Gas and Electric Co. v. Roberts*, 176 Cal. 183, necessarily includes a situation where one utility leases its property to another utility for release to the general public. *The proceeds of the lease, like the proceeds of the sale, would have to be included in the gross receipts of both companies.*

Does not a common sense view of the decision also require the same result when for the first lessor we substitute a private corporation and instead of a gross receipts tax, which this court has denominated a "property tax" on the property leased or sold, a local property tax? *Wherein are the situations different?*

We respectfully submit that far from being the sole reliance of petitioners, the *State Board Cases* are simply an exact appliance to the facts of the instant case of a rule long established in California.

Furthermore, it is not necessary for petitioners to be able to point to a state decision on all fours with the facts presented to the federal tribunal. It is only necessary to show that the facts before this court are controlled by

principles of state law. Thereupon it becomes the duty of the federal court to apply to the situation before it those principles in such a manner that the decision of the federal court resting upon a construction of state law will not be out of line with the decisions by the state tribunals.

Pullman v. Knott, 235 U. S. 23, 27;
Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 305;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, 291;
Royal Mineral Association v. Lord, 13 F. (2d) 227, 229.

Conclusion

We, therefore, respectfully submit that there is no serious constitutional question which would arise out of the construction placed upon Section 14 by petitioners. That such a construction is one which clearly follows from the language used is, we believe, tacitly admitted by the decision of this court. This difficulty removed, we respectfully submit that the court erred in not following the clear and grammatical construction of the section.

Secondly, we submit that the court erred in holding that there was not an authoritative decision by the California courts controlling the instant case. Although the two decisions precisely determining the exact facts presented here were actually vacated by the orders granting rehearing, yet these cases were simply the application of principles established by cases long ago decided and ratified by the people of the State of California. It was not, we respectfully submit, open to this court to decide a matter of construction of the state constitution con-

trary to that necessarily following from previous decisions by the state courts.

Respectfully submitted,

EVERETT W. MATTOON,
County Counsel,
W. SUMNER HOLBROOK, JR.,
Deputy County Counsel,
Attorneys for Petitioners.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay; and in our opinion is well founded in point of law.

EVERETT W. MATTOON,
W. SUMNER HOLBROOK, JR.

In the Supreme Court
OF THE
United States

Supreme Court, U. S.
FILED
OCT 30 1926
WM. R. STANSBURY
CLERK

OCTOBER TERM, 1926

No. 6[redacted] 133

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; E. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California; H. A. PAYNE, Auditor of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic,

Petitioners,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF FOR RESPONDENTS.

(In opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to review decision rendered June 7, 1926, and reported in 13 F. (2d) 814, reversing unreported decision of the District Court for the Southern Division of the Southern District of California.)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No.

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; E. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California; H. A. PAYNE, Auditor of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic,

Petitioners,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF FOR RESPONDENTS.

(In opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to review decision rendered June 7, 1926, and reported in 13 F. (2d) 814, reversing unreported decision of the District Court for the Southern Division of the Southern District of California.)

STATEMENT OF THE CASE.

The respondents, hereinafter called plaintiffs, are California public service corporations, engaged in the telephone business. They brought this suit to enjoin the County of Los Angeles and several of its officers, the petitioners in this Court and the defendants below, from seizing and selling some 300,000 so-called "telephone talking sets" in satisfaction of a local tax.

The Circuit Court of Appeals directed the injunction to issue as prayed (R. pp. 93, 95), reversing the decree of the District Court. The District Court had strongly intimated that the plaintiffs were entitled to prevail on the merits (R. p. 50), but had dismissed the bill for want of jurisdiction, stating that while the court "might take jurisdiction", it was "not persuaded that it would be error not to do so", and that it believed that "the matter should be left to the Courts of the State of California" (R. p. 51).

Federal jurisdiction was invoked by the plaintiffs and sustained by the Circuit Court of Appeals under Section 24 of the Judicial Code, on the ground that the complaint presented a federal question under the Fourteenth Amendment (R. pp. 85-88). The jurisdictional amount admittedly is involved (R. pp. 4, 15). Equity jurisdiction was sustained on the ground that the plaintiffs were faced with irreparable injury, and that they had no adequate remedy at law because (1) upon payment of the tax they could recover it, if at all, only by a multiplicity of suits against the defendant county and sixteen separate municipalities for which the tax is collected; (2) no interest on the tax could be recovered; (3) it is extremely doubt-

ful whether plaintiffs, being lessees and not owners of the talking sets, are even accorded the right under the California statutes, to maintain an action to recover the tax, and (4) if such an action would lie, the plaintiffs could not recover the whole amount paid, since, under the state law, certain costs of collection could not be refunded.

The controversy arises as follows: During 1925 the plaintiffs had upwards of 300,000 telephone instruments in use in Los Angeles County, each instrument consisting of (1) a receiver, transmitter and induction coil, which the defendants call collectively a "telephone talking set"; (2) a stand, in the case of a desk telephone, or a body, in the case of a wall telephone, and (3) necessary wiring. All these parts are indispensable to the use of an instrument. The plaintiffs own the stands, bodies and wiring of the instruments involved in this case. They do not own the talking sets, but lease them from the American Telephone and Telegraph Company, a New York corporation, which does not operate in California.

Section 14 of Article XIII of the California constitution (quoted by the Circuit Court of Appeals, R. pp. 78-79) provides that telephone companies shall pay a percentage of their gross receipts (5½ per cent, under Section 3664a of the Political Code of California) as a tax for state purposes upon

> "their franchises, * * * poles, wires, * * * conduits, rights of way and other property, or any part thereof, *used* exclusively in the operation of their business"

in California, which tax

> "shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies."

The plaintiffs duly paid their gross receipts taxes which were some $2,300,000 (R. p. 46). The defendants nevertheless levied the local tax in suit upon the leased telephone talking sets and threatened to seize and sell the sets to collect it (R. p. 11), claiming that the gross receipts tax is in lieu of local taxes on property owned by the plaintiffs and not upon property leased by them, even though used in the telephone business.

For a further statement of the facts we refer to the opinion of the Circuit Court of Appeals (R. pp. 76-78), and to the summary of the complaint under Point I in this brief. The facts alleged in the complaint are either admitted by the answer (R. pp. 24-29), or established by undisputed evidence (R. pp. 42-48).

ARGUMENT.

I.

THE COMPLAINT PRESENTS A FEDERAL QUESTION WHICH GAVE THE DISTRICT COURT JURISDICTION OVER THE CASE, EXTENDING TO ALL QUESTIONS IN IT, INCLUDING QUESTIONS OF STATE LAW (Answering Petitioners' Brief, pp. 8-12).

The substance of the complaint by paragraph numbers, omitting paragraphs I-IV (R. p. 4) and XVII-XVIII (R. p. 16), which contain usual formal allegations, and paragraphs V-VII (R. pp. 4-7), which describe the business of the plaintiffs and allege that the plaintiffs lease the talking sets and own the other parts of the instruments involved in this suit, is as follows:

8. On or about April 29, 1925, the defendant Hopkins, as county assessor, sent the American Telephone and

Telegraph Company (the owner of the talking sets) a notice, set out in the complaint (R. p. 8), demanding payment of a tax of $57,017 upon the sets. A subsequent notice (R. p. 9) of the delinquency of the tax was sent to the American Company under date of June 12, 1925 (R. pp. 7-9).

9. Under date of July 8, 1925, the assessor sent the American Company a notice in care of the two plaintiffs (R. pp. 10-11), saying that if the tax was not paid immediately he would proceed to collect it by seizing and selling as many of the talking sets as might be necessary.

10. The talking sets are operative property of the plaintiffs, that is to say, property used exclusively in their business in California. The plaintiffs duly reported their instruments, including the talking sets, to the State Board of Equalization as operative property, as provided in Section 3665b of the Political Code of California, and the assessor filed no protest against classifying them as operative property (R. pp. 11-13). The assessor should have filed such a protest if he claimed that the talking sets were non-operative property, or subject to local taxation (Pol. Code, Sec. 3666).

11. Under Section 14 of Article XIII of the state constitution, taxes upon the talking sets are entirely and exclusively for state purposes. The plaintiffs have paid, or are ready, willing and able to pay, gross receipts taxes to the state, as provided by law, and such gross receipts taxes are in lieu of all other taxes and licenses, state, county and municipal, upon the operative property of plaintiffs, including the talking sets. The pretended local tax or assessment is unlawful and void (R. pp. 13-14).

12. The laws of California contain no provision whereby the plaintiffs could pay the tax under protest and bring suit to recover it. Even if it were possible under the state law to recover the tax in an action at law, the plaintiffs could not recover interest thereon (R. p. 14).

12a. The defendants in the proceeding sought to be enjoined are acting for said county and sixteen separate municipalities named in the complaint, and if the taxes are collected, the county will forthwith distribute to each of said sixteen separate municipalities a substantial part thereof, and the plaintiffs could recover the parts of the tax so distributed, if at all, only in a multiplicity of suits (R. pp. 20-23).

13. The threatened seizure and sale of the talking sets would disrupt and paralyze the telephone service of the plaintiffs within the County of Los Angeles, to their great and irreparable injury. The consequent loss, damage and injury would greatly exceed $3000 (R. pp. 14-15).

14. The threatened seizure and sale would deprive the plaintiffs of their right to transmit messages between Los Angeles County and other places in the United States and would deprive plaintiffs of their property without due process of law, and would deny them the equal protection of the laws and is and would be in violation of the rights, privileges and immunities of the plaintiffs under the Fourteenth Amendment to the Constitution of the United States (R. p. 15).

15. If the statutes of California, under which the defendants claim to act (which statutes are enumerated in the complaint), be construed to authorize the threatened

seizure and sale, they are to that extent in violation of the said Fourteenth Amendment (R. pp. 15-16).

16. Although plaintiffs claim the tax is void, they offer to pay it if it is held valid (R. p. 16).

To the point that the complaint, alleging threatened unconstitutional action by the defendants, presents a federal question we cite the following cases, in addition to *Greene, Auditor of Kentucky, et al. v. Louisville etc. R. Co.*, 244 U. S. 499, 508, and *Raymond, Treasurer of Cook County, Illinois v. Chicago Traction Co.*, 207 U. S. 20, 35, cited by the Circuit Court of Appeals (R. pp. 85-87):

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97-98;

Wilson, County Collector of Taxes v. Illinois Southern R. Co., 263 U. S. 574, 575-576;

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445;

Keokuk etc. Bridge Co. v. Salm, County Treasurer, et al., 258 U. S. 122, 123-124;

Louisville etc. R. Co. v. Greene, Auditor, et al., 244 U. S. 522, 528.

See also:

Terrace v. Thompson, Attorney General, et al., 263 U. S. 197, 214;

Illinois Central R. Co. v. Greene, Auditor, et al., 244 U. S. 555, 559-560;

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462;

Home Telephone Co. v. County of Los Angeles, 227 U. S. 278, 287;

Siler et al., Commissioners v. Louisville etc. R. Co., 213 U. S. 175, 190-191;

San Francisco National Bank v. Dodge, 197 U. S. 70, 75;

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 390-391.

In *Home Telephone Co. v. County of Los Angeles*, 227 U. S. 278, quoted and followed by the Circuit Court of Appeals (R. pp. 87-88), this Court expressly overruled the case of *Barney v. New York*, 193 U. S. 430, relied on by the petitioners (Br. pp. 9-10), and pointed out further that the case of *Memphis v. Telephone Co.*, 218 U. S. 624, also cited by the petitioners (Br. p. 9), involved only a question "of pleading and in no sense of substantive Federal power" (227 U. S. 294).

The case of *St. Joseph etc. R. Co. v. Steel*, 167 U. S. 659, the only other case cited by the petitioners (p. 11), is clearly not in point. The question there was whether a railroad bridge was subject to local taxation under the laws of Kansas. Federal jurisdiction was invoked on the ground that Congress had given the original builders of the bridge a franchise to charge tolls. This manifestly did not present a federal question because there was nothing to show that the federal statute had anything to do with the case. It was not claimed that the act of Congress exempted the bridge from the tax in controversy, or, as in the case at bar, that the collection of the tax would violate constitutional rights.

The petitioners further attack the Court's jurisdiction by arguing that the seizure of the talking sets in satisfaction of the tax would not violate the federal constitution. The complaint alleges otherwise (R. pp. 15-16; complaint paras. XIV-XV), the contention of the plaintiffs being that the threatened action of the defendants

is contrary both to the state law and to the Fourteenth Amendment (as to which latter see infra, IV). The argument of the defendants is that the Courts below should have defeated their jurisdiction by *assuming* that the plaintiffs had no meritorious case on the constitutional question. This argument is clearly unsound (*Cuyahoga Power Co. v. Akron*, 240 U. S. 462; *Old Colony Trust Co. v. City of Seattle*, 270 U. S. ___; 46 Sup. Ct. Rep. 552). A federal question raised by a pleading can be disregarded only where it is "so obviously insufficient as to cause it to be without color of merit and in effect no claim at all" (*Moore v. New York Cotton Exchange*, 270 U. S. ___; 46 Sup. Ct. 367, 370).

The decision of the Circuit Court of Appeals that the tax was invalid under the law of California (R. pp. 78-85) made it unnecessary to consider the federal question. But, since that question was presented by the complaint, the Court had jurisdiction and, consequently, power to decide the case if so advised on points of state law. See:

Bohler, Tax Collector, et al. v. Callaway, 267 U. S. 479, 489;

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 98;

Louisiana Public Service Commission v. Morgan's etc. Steamship Co., 264 U. S. 393, 395;

Davis, et al. v. Wallace, et al., 257 U. S. 478, 482;

Greene, Auditor, et al. v. Louisville etc. R. Co., 244 U. S. 499, 508;

Camp v. Boyd, 229 U. S. 530, 551-552;

Siler, et al., Commissioners v. Louisville etc. R. Co., 213 U. S. 175, 190-191;

Ex parte Young, 209 U. S. 123.

II.

THE PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW AND ARE ENTITLED TO AN INJUNCTION.

A. The Defendants in the Proceeding, Against Which the Circuit Court of Appeals Ordered the Injunction to Issue, Were Acting for the Defendant County and for Sixteen Separate Municipalities, to which Substantial Parts of the Tax, if Collected, Would be Forthwith Distributed. The Plaintiffs Could Recover the Tax, if at all, Only by a Multiplicity of Suits (Answering Petitioners' Brief, pp. 15-16).

The plaintiffs allege (R. pp. 20-23) and the defendants admit (R. p. 47) that substantial parts of the tax in suit are to be collected by the defendants for sixteen separate municipalities enumerated in the complaint (R. pp. 21-22).

All these municipalities have availed themselves of the privileges conferred by the act approved March 27, 1895, as amended (Deering's General Laws 1925, Vol. 2, p. 3531; Cal. Stats. 1895, p. 219, as amended) to have the County of Los Angeles collect their taxes for them. This act provides for the levy and collection of city taxes by county officials, where the legislative body of the municipal corporation so elects.

Under Section 4 of this act, each municipality fixes its own tax rate. Section 5 provides that municipal taxes shall be collected at the same time and in the same manner as county taxes and that, when collected, they shall be paid to the treasurer of the municipal corporation to which they belong "under the general requirements and penalties provided by law for the settlement of other taxes". The general law requires the tax collector to pay all taxes in his hands to the county treasurer on the first Monday of each month (Pol. Code, Secs. 3753, 4126);

and further, to make such payment "at least once a month, and oftener, in his discretion" (Pol. Code, Sec. 4126).

In arguing (Petition pp. 15-16) that the plaintiffs could recover all of the tax in suit from the county, the petitioners not only assume that a suit would lie against the county, which is highly doubtful (infra II, C), but also run counter to Section 3804 of the Political Code, the very statute under which they claim that the plaintiffs could sue for refunds. That section does not make the county liable for taxes illegally or improperly collected for municipalities; on the contrary, it provides that refunds of such taxes can only be made out of money in the possession of the county treasurer

> "belonging to the appropriate fund of such * * * public corporation".

Since the law requires that taxes collected for municipalities be paid monthly, or oftener (Pol. Code, Sec. 4126), it is highly uncertain whether the county treasurer would at any time have municipal funds available for tax refunds. Moreover, under Section 1 of the statute (Act of March 27, 1895), *any municipality may at any time withdraw from the arrangement whereby the county collects its taxes*, and so destroy the only source from which the county could make a refund.

It is perfectly manifest, we submit, as the Circuit Court of Appeals held (R. p. 91), that even if the plaintiffs could pay the taxes and sue at law to recover them, they could enforce a complete refund only by suits against the county and the sixteen municipalities. This would involve a multiplicity of suits, which equity has jurisdiction to prevent.

See:

Raymond, Treasurer, et al. v. Chicago Traction Co., 207 U. S. 20, 38-40;

Wilson, County Collector, v. Illinois Southern R. Co., 263 U. S. 574, 576-577;

Waggoner et al. v. Wichita County, 298 Fed. 818 (Aff. 5th C. C. A., 3 F. (2d) 962);

Bank of Arizona v. Howe, Commissioner, et al., 293 Fed. 600, 605;

Waggoner v. Baylor County, 298 Fed. 822;

Standard Oil Co. v. Howe, Commissioner et al., 257 Fed. 481, 487.

B. Even if, Under the State Law, the Plaintiffs Could Pay the Tax and Sue at Law to Recover It, They Could Not Recover Interest (Answering Petitioners' Brief, pp. 17-19).

It is settled in California that a plaintiff who recovers wrongfully collected taxes cannot recover interest prior to judgment (*Engebretsen v. City of San Diego*, 185 Cal. 475, 479-480, 197 Pac. 651; *Spencer v. City of Los Angeles*, 180 Cal. 103, 115, 179 Pac. 163; *Miller v. County of Kern*, 150 Cal. 797, 798, 799, 90 Pac. 119; *Savings and Loan Society v. San Francisco*, 131 Cal. 356, 363; 63 Pac. 665; *United Taxpayers v. San Francisco*, 55 Cal. App. 239, 243, 203 Pac. 120; *Southwest Land Co. v. County of Los Angeles*, 46 Cal. App. 9, 15; 188 Pac. 575).

We have found no case, and the defendants have cited none, which holds that the right to recover taxes *without interest* affords an adequate remedy at law. The only cases, so far as we know, in which this subject has been considered, are the two cases cited by the Circuit Court of Appeals (R. p. 92), one of them decided by the Supreme

Court of California and the other by the District Court of the United States, for the Southern District of New York. These cases directly hold that the legal remedy under such circumstances is not adequate.

Birch v. Board of Supervisors of Orange County, 191 Cal. 235, 237, 215 Pac. 903;

Proctor & Gamble Distributing Co. v. Sherman, Attorney General, et al., 2 F. (2d) 165.

C. Any Possible Right of the Plaintiffs Under the State Law to Pay the Tax and Sue to Recover it, Either Under Section 3804 of the Political Code of California, or Otherwise, is Too Doubtful to Be Adequate (Answering Petitioners' Brief, pp. 13-14).

The usual procedure in California for the recovery of taxes, collected under a void assessment, is by suit, following payment under protest, in accordance with *Section 3819* of the Political Code. That section, however, affords no remedy in the case at bar, because, by its express terms, a suit under it will lie only by "the owner" of the property, or his representative, and not by any one else (*Warren v. City and County of San Francisco*, 150 Cal. 167, 170; 88 Pac. 712). The plaintiffs are lessees, not owners, of the talking sets.

To meet this consideration the defendants claimed in the Circuit Court of Appeals, and claim here, that the plaintiffs should proceed under another statute, Section 3804 of the Political Code (quoted Petition, p. 13). The Circuit Court of Appeals points out, however (R. p. 91), that this section does not purport to cover cases involving assessments claimed to be "void in whole or in part"—which are specifically covered by Section 3819—and that, in the absence of a decision by the Supreme Court of Cali-

fornia allowing an action under Section 2804, in circumstances reasonably like those in the case at bar, it would be inequitable to compel the plaintiffs "to take the chance of obtaining relief at law" (R. p. 91). To this point, that a doubtful remedy is not adequate, the Circuit Court of Appeals cited (R. p. 92) *Atlantic Coast Line v. Doughton, Commissioner, etc.*, 262 U. S. 413, 426, and *Davis v. Wakelee*, 156 U. S. 680, 688. To the same effect are:

Judicial Code, Sec. 267;

Bobler, Tax Collector, et al. v. Calloway, 267 U. S. 479, 488 ("If the remedy by law is doubtful, equitable relief may be had");

Wilson, Tax Collector v. Illinois Southern R. Co., 263 U. S. 574, 577 ("* * * The adequacy of a remedy at law must be clear");

Dawson, Attorney General, v. Kentucky Distilleries Co., 255 U. S. 288, 296 ("It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit' ");

Wallace v. Hines, 253 U. S. 66, 69 ("* * * we might not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought");

Union Pacific R. Co. v. County Commissioners of Weld County, 247 U. S. 282, 287 (holding that a remedy under a state statute like Fed. Code, Sec. 2804, was doubtful and inadequate where its application had not been determined by the State Supreme Court).

D. Even if the Plaintiffs Could Maintain an Action at Law for the Tax, They Could Not Recover the Whole Amount Paid, Because Certain Costs of Collection Could Not, Under the State Law, Be Refunded (Answering Petitioners' Brief, pp. 16-17).

Section 6 of the Act of March 27, 1895 (Cal. Stats. 1895, p. 219), under which a county collects municipal taxes, provides that the county is entitled to the expenses of collecting them and that it shall

> "deduct such expenses from the taxes of such municipal corporation or city, while in the hands of the county tax collector, and transfer the same into the county salary fund * * *".

As shown in connection with Point II, A, the county, under Section 3804 of the Political Code, can make refunds of taxes collected for municipalities only from municipal funds. The quotation in the preceding paragraph from the Act of March 27, 1895, shows that collection costs are not part of the municipal funds, and consequently could not be repaid, even if the plaintiffs recovered a judgment at law. This circumstance, in itself, shows that any possible legal remedy is not adequate (*Hopwood, Treasurer, et al. v. Chicago Traction Co.*, 207 U. S. 20, 29).

III.

THE TAX OR SUIT IS INVALID UNDER THE STATE LAW (Answering Petitioners' Brief, pp. 19-20).

On this subject we refer to the opinion of the Circuit Court of Appeals (R. pp. 70-71), pointing out only the fundamental misconception in the statement of the defendants that the effect of the decision below is to "re-

empt" owners of operative property leased to public utilities from local taxation. The gross receipts tax does not effect a tax exemption; it is a substituted tax (*San Bernardino County v. State Board of Equalization*, 172 Cal. 76, 78; 155 Pac. 458). This substituted tax is a tax on property, not persons (*San Francisco v. Pacific Telephone and Telegraph Co.*, 166 Cal. 244; 135 Pac. 971; *Pacific Gas and Electric Co. v. Roberts*, 168 Cal. 420; 143 Pac. 709; *Lake Tahoe Ry. etc. Co. v. Roberts*, 168 Cal. 551; 143 Pac. 786; *Pullman Co. v. Richardson*, 261 U. S. 330). In the very nature of things, it rests, as the Circuit Court of Appeals held (R. p. 83), on all property contributing to gross receipts, which manifestly includes leased property as well as property held in fee.

IV.

THE TAX IN DISPUTE IS INVALID UNDER THE FOURTEENTH AMENDMENT

The Circuit Court of Appeals, having decided that the tax in dispute was invalid under the state law, found it unnecessary to decide the federal question raised by the complaint. To show, however, the substantial and meritorious nature of that question, we summarize briefly our contention that the threatened action of the defendants would violate the rights of the plaintiffs under the federal constitution. We contend:

1. Arbitrary and unreasonable discrimination in matters of taxation violates the due process clause (*Kidd-gee v. Wisconsin*, 270 U. S. 239; 46 Sup. Ct. 260, 261; *Chicago etc. R. Co. v. Kendall, Governor, et al.*, 266 U. S.

94, 97, 98; *Greene, Auditor, et al. v. Louisville etc. R. Co.*, 244 U. S. 499). We submit that taxation of leased property twice as heavily as property of the same kind which is not leased—and that would be the inevitable consequence of the tax in suit—is unreasonable, arbitrary and oppressive.

2. The California gross receipts tax is a property tax on the talking sets (*Pullman Co. v. Richardson*, 185 Cal. 484, 487; 197 Pac. 346, affirmed 261 U. S. 330, 337). The tax in suit, being also a property tax on the same property, would, therefore, result in double taxation. No other property in the state is taxed twice; every other kind of property pays only one tax. To uphold the tax in suit would, we submit, deny plaintiffs the equal protection of the laws, because the law of the state forbids double taxation (Pol. Code, Sec. 3607), and the state constitution (Art. XIII, Sec. 1) further requires all property in the state, with certain limited exceptions, to be taxed in proportion to its value. Double taxation may not be unconstitutional *per se*, but double taxation in the face of state laws forbidding it is a manifest denial of the equal protection of the laws (*Johnson, Treasurer, et al., v. Wells Fargo & Co.*, 239 U. S. 234; *Railroad and Telephone Companies v. Board of Equalization*, 85 Fed. 302, 317, and cases cited; *Louisville etc. R. Co. v. Bosworth, Auditor, et al.*, 230 Fed. 290, 300).

3. The state constitution provides that the gross receipts tax on operative property of public utilities is "in lieu of all other taxes and licenses, state, county and municipal". Taxation of operative property for local purposes, in the face of this provision, is a clear denial of

the equal protection of the laws and a seizure in satisfaction of such a tax is a manifest taking of property without due process of law.

We respectfully submit that the petition for certiorari should be denied.

Dated, San Francisco,
October 20, 1926.

Oscar Lawler,
F. D. Madison,
Alfred Sutro,
Attorneys for Respondents.

FILED
DEC 1
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 133

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California, F. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California; H. A. PAYNE, Auditor of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic,

Petitioners,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF OF RESPONDENTS.

(On Certiorari to the Circuit Court of Appeals for the Ninth Circuit. Opinion below (Tr. p. 42) reported 13 F. (2d) 817.)

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Respondents brought this suit to enjoin the collection of a local tax on three leased patented parts (by the petitioners collectively caled "talking sets"), of some 308,200 telephone instruments used by them in their telephone business in California. The question is whether the mere fact hat the "talking sets" are leased and not owned by respondents, makes them subject to local taxation, depite the substituted property tax on the full value threof which respondents pay the state in the form of a percentage of their gross receipts. The Circuit Court of Appeals held that the "talking sets" are not subject to local taxation, and directed an injunction to issue.

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SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF OF RESPONDENTS.

(On Certiorari to the Circuit Court of Appeals for the Ninth Circuit. Opinion below (Tr. p. 42) reported 13 F. (2d) 817.)

STATEMENT OF THE CASE.

Respondents, plaintiffs below, brought this suit in the District Court for the Southern District of California to enjoin the County of Los Angeles, and certain of its officers from seizing and selling some 308,200 telephone "talking sets", which they lease, in satisfaction of a local tax of $52,224.45 (Tr. p. 16). A decree dismissing the complaint for lack of jurisdiction was reversed by the Circuit Court of Appeals, which directed an injunction to issue as prayed for by respondents (Tr. p. 54). Certiorari was granted by this court on November 29, 1926.

The controversy arises as follows: The State of California uses the so-called separated system of taxation, under which state and local revenues come from distinct sources. As part of this system many classes of public utilities pay the state, for state purposes, certain percentages of their gross receipts "in lieu of all other taxes and licenses, state, county and municipal," upon "their franchises, * * * poles, wires, * * * rights of way and other property, or any part thereof, used exclusively in the operation of their business in this state" (Const. Art. XIII, Sec. 14, Subd. a). The sharp question in the case is whether property *leased* by a telephone company and used exclusively in its telephone business, is subject to local taxation, despite the "in lieu" clause in the foregoing constitutional provision, and despite the fact, hereinafter shown, that the rates of the gross receipts tax were specifically fixed so as to make that tax the equivalent of a fair tax on all property *used* by public service corporations in their business, whether owned or leased, or howsoever held.

The "talking sets" in question are leased and not owned by respondents, and petitioners claim that they are, for that reason, subject to local taxation. Respondents contend that the local tax is invalid, both under the state law and under the federal constitution. The Circuit Court of Appeals, having sustained jurisdiction on the ground that the case involves a substantial federal question, held that, under the constitution and laws of the state, such local taxation is not permitted.

Petitioners claim that the main question in the case, in so far as it turns on the law of the state, has since the decision of the Circuit Court of Appeals been decided adversely to that decision by the State Supreme Court. The state court on July 2, 1927, did render such a decision in the case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization, et al.*, 74 Cal. Dec. 96.* Subsequently, however, on the petition of the Telephone Company, it made an order granting a rehearing. The effect of this order, under the settled rules of the state court, was to "vacate the previous opinion and judgment and set the whole matter at large" (*Miller & Lux Incorporated v. James*, 180 Cal. 38, 48, 179 Pac. 174). We may add that the case against the Board of Equalization was an original proceeding in mandamus, which was dismissed by the applicant after the order for rehearing, because the controversy in that proceeding had become moot. Further reference to this case is made below (infra pp. 21-23).

* The reference "Cal. Dec." is to "California Decisions", the unofficial advance publication of the state court's opinions.

THE FACTS.

Respondents, California corporations, are telephone companies operating in Los Angeles County, California. During 1925 they had in use in that county upwards of 300,000 telephone instruments. Each instrument consists of (1) a receiver, transmitter and induction coil (for which petitioners coined the collective name "talking set"), (2) a stand in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. Respondents own the stands, bodies and wiring. They do not own the receivers, transmitters and induction coils, but lease them from the American Telephone and Telegraph Company, which is a New York corporation not operating in California.

In March, 1925, respondents, as required by the state law (Political Code, Sec. 3665c, quoted Appendix I, also infra p. 71), reported their operative property to the State Board of Equalization, including in their reports the telephone instruments, of which the "talking sets" were integral parts. The county assessor, who is one of the defendants and petitioners in this case, made no protest against the inclusion of the "talking sets" in these reports, which he should have done, if he objected to the inclusion—a fact in and of itself sufficient under section 3666 of the Political Code, as construed by the Supreme Court of the state, to render the tax in dispute utterly void (infra pp. 70-77).

In due course respondents paid the state some $2,340,000 for their gross receipts taxes for the year 1925-1926 (Tr. p. 29). All proceedings of respondents in this behalf were admittedly regular.

In April, 1925, the county assessor assessed the tax in suit amounting to $52,224.45 against the American Tele-

phone and Telegraph Company, as owner of the "talking sets". His theory was that the gross receipts taxes of respondents are in lieu of local taxes on operative property *owned* by them, but do not preclude local taxation of *leased* operative property.

The American Company did not pay the tax and the assessor threatened to seize and sell the "talking sets" (Tr. p. 6). Respondents brought this suit to enjoin such seizure and sale. Federal jurisdiction was invoked on the ground that the case involved a federal question, the bill alleging that the tax is invalid under the Fourteenth Amendment as well as under the state law. Equity jurisdiction was invoked on the ground that there is no adequate legal remedy for the disruption of respondents' business and consequent irreparable damage which the threatened seizure and sale of the "talking sets" would involve.

For convenience of reference the several paragraphs of the complaint by number, omitting paragraphs I-V and XVII and XVIII, which contain usual formal allegations, may be summarized as follows:

VI. Plaintiffs maintain and operate upwards of 300,000 telephone instruments in Los Angeles County. Each instrument consists of a so-called "talking set", besides a stand or body and the wiring and other apparatus connected therewith, all of which parts are indispensable to the operation of the instrument (Tr. pp. 3-4).

VII. The "talking sets" are owned by the American Telephone and Telegraph Company and are leased by it to plaintiffs; plaintiffs own the other parts of the instruments (Tr. p. 4).

VIII. On or about April 29, 1925, the defendant Hopkins, as county assessor, sent the American Telephone and Telegraph Company a notice, set out in the complaint (Tr. pp. 4-5), that a tax of $57,017. had been assessed upon 308,200 telephone "talking sets" and demanding payment of the same. A subsequent notice (Tr. p. 5) of the delinquency of the tax was sent to the American Company under date of June 12, 1925 (Tr. pp. 4-5).

IX. Under date of July 8, 1925, the assessor sent the American Company a notice in care of the two plaintiffs (Tr. p. 6), saying that if the tax was not paid immediately he would proceed to collect it by seizing and selling as many of the "talking sets" as might be necessary.

X. The "talking sets" are operative property of plaintiffs, that is to say, property used exclusively in their business in California. Plaintiffs duly reported their instruments, including the "talking sets", to the State Board of Equalization as operative property, as provided in section 3665b of the Political Code of the State of California, and the assessor filed no protest against classifying them as operative property (Tr. p. 7). The assessor should have filed such a protest if he claimed that the "talking sets" were nonoperative property (Pol. Code, Sec. 3666).

XI. Under section 14 of article XIII of the state constitution, taxes upon the "talking sets" are entirely and exclusively for state purposes. Plaintiffs have paid, or are ready, willing and able to pay, gross receipts taxes to the State of California as provided by law, and such gross receipts taxes are in lieu of all other taxes and licenses, state, county and municipal, upon the operative

property of plaintiffs, including the "talking sets". The pretended local tax or assessment is unlawful and void (Tr. p. 8).

XII. The laws of California contain no provision whereby plaintiffs could pay the tax under protest and bring suit to recover it. Even if it were possible under the state law to recover the tax in an action at law, plaintiffs could not recover interest thereon (Tr. pp. 8-9).

XIIa. The defendant county, if it collects the tax, will forthwith distribute substantial parts of it among sixteen separate municipalities, named in the complaint, and plaintiffs could recover the parts of the tax so distributed, if at all, only in a multiplicity of suits (Tr. pp. 12-14).

XIII. The threatened seizure and sale of the "talking sets" would disrupt and paralyze the telephone service of plaintiffs within the County of Los Angeles, to their great and irreparable injury. The consequent loss, damage and injury from such seizure or sale would greatly exceed the sum of $3000 (Tr. p. 9).

XIV. The threatened seizure and sale would deprive plaintiffs of their right to transmit messages between Los Angeles County and other places in the United States and would deprive plaintiffs of their property without due process of law, and would deny them the equal protection of the laws and is and would be in violation of the rights, privileges and immunities of plaintiffs under the Fourteenth Amendment to the Constitution of the United States (Tr. p. 9).

XV. In so far as the statutes of California, under which defendants claim to act (which statutes are enumerated in the complaint), purport to authorize the

threatened seizure and sale, they are contrary to the Fourteenth Amendment and void (Tr. pp. 9-10).

XVI. Although plaintiffs claim the tax is void, they offer to pay it if it is held valid (Tr. p. 10).

The defendants (petitioners in this court) filed an answer admitting practically all the facts alleged in the complaint (Tr. pp. 14-19). They also made a motion to dismiss, claiming that the court was without jurisdiction; that respondents had an adequate remedy by paying the tax and suing at law to recover it, and further, that the tax was valid (Tr. pp. 20-21).

At the hearing of the motion to dismiss respondents introduced evidence in support of the few controverted allegations of the complaint (Tr. pp. 26-30). The case was then by stipulation submitted for decision as follows: On motion to dismiss and, in the event that the motion should be denied, then, without further hearing, for final determination upon the application for a permanent injunction (Tr. pp. 29-30). There was no hearing upon the application for a preliminary injunction, the temporary restraining order granted on the filing of the bill having been kept in effect by stipulation (Tr. p. 25).

The trial court, although it strongly intimated in its opinion that respondents were entitled to relief on the merits, granted the motion to dismiss on the ground that, while it had jurisdiction over the case, policy required that the questions involved be left to the state courts for decision (Tr. pp. 31-32). The decree dismissing the bill, as above stated, was reversed by the Circuit Court of Appeals.

PRELIMINARY REFERENCE TO JURISDICTIONAL QUESTIONS INVOLVED.

The jurisdictional questions fall under two heads—(1) federal jurisdiction and (2) equity jurisdiction. Petitioners commence their brief with a discussion of these questions. The close relationship, however, between the merits of the case and the question of federal jurisdiction has led us at the outset to make only a preliminary reference to the jurisdictional questions, and to present our argument on them after our argument on the merits.

Equity jurisdiction is invoked on the ground that respondents have no adequate remedy at law because—(1) the state law does not permit respondents as lessees, to maintain an action at law to recover the tax if paid; (2) in any event, they could not recover interest on the tax if paid, and (3) even if they could recover the tax if paid, they could do so only in a multiplicity of suits against the county and the sixteen municipalities, to which the county would distribute the parts of the tax collected for them.

The case involves the jurisdictional amount, and federal jurisdiction, there being no diversity of citizenship, depends on whether the bill raises a federal question. Under the settled rule of this court that question in turn depends upon whether the claim of respondents that the collection of the tax would violate their rights under the Fourteenth Amendment, is substantial and *bona fide* (*Greene, Auditor of Kentucky, et al. v. Louisville etc. R. Co.*, 244 U. S. 499, 508; *Raymond, Treasurer of Cook County, Illinois, v. Chicago Traction Co.*, 207 U. S. 20, 35 (infra pp. 101-107)).

Petitioners admit that the claim of federal right is made in good faith (Petitioners' Br. p. 11). Jurisdiction, therefore, is established unless the claim is "so obviously insufficient as to cause it to be without color of merit and, in effect, no claim at all" (*Moore v. New York Cotton Exchange*, 270 U. S. 593, 609).

That respondents' claim of constitutional right, as presented by the bill of complaint, is substantial, may, we think, be briefly shown as follows:

The tax in suit is on the full value of the "talking sets". The gross receipts tax is also on the full value of the sets, because it is a substituted property tax, the rates of which were specifically fixed to include all taxes justly due on all property used in operation, including leased property. No other leased property in California is taxed at its full value to both lessor and lessee. To require respondents to pay in the form of the gross receipts tax a tax on the full value of the "talking sets", in which they have only a leasehold interest, and at the same time to bear, as they must, the ultimate burden of the local tax on the same property, would discriminate against them in favor of all other lessees in the state who do not pay gross receipts taxes, including certain public utilities, such as water companies and ferries. These discriminations are not based upon any reasonable classification. Furthermore, if the tax in suit is valid, it necessarily follows that the burden of the gross receipts tax on the owned property of public utilities will increase with the amount of property leased, thus arbitrarily discriminating against respondents in favor of all public utilities operating less or no leased property.

Independently of the foregoing, the double tax burden for which petitioners contend, in the face of state statutory provisions expressly forbidding double taxation, would deprive respondents of the equal protection of the laws.

The Circuit Court of Appeals held that the allegations of the bill of complaint raised a substantial federal question and were sufficient to establish jurisdiction. In concluding its discussion on this subject the court said (Tr. p. 53):

> "The conclusion we draw from the language of the Constitution and the statutes is that the gross receipts tax is a proper tax on the talking sets and that the levy threatened by the local authorities would result in the imposition of a double tax on the same property, effected not merely by a mistake, but with intent to adopt as a practice an unlawful discrimination, and that remedy by injunction will lie (Chicago G. W. R. v. Kendall, 266 U. S. 94).
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> As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion, and left a bounden duty to proceed to a decree."

Since federal jurisdiction here depends upon the substantial nature of the federal constitutional question, which in turn, involves the nature and effect of the state tax laws, it seems fitting to first discuss the state law. If jurisdiction is established, it extends, of course, to questions of state law along with all other questions in the case (infra, p. 115).

ARGUMENT.

Our argument is as follows:

(1) The state law does not permit local taxation of leased property used in operation by telephone companies;

(2) The particular tax in dispute is void under the state law for the special reason that the county assessor did not protest against the inclusion of the "talking sets" in the reports of respondents' operative property to the State Board of Equalization;

(3) The tax in dispute is invalid under the federal constitution;

(4) The case is within the jurisdiction of the federal courts, and

(5) The case is one for equity jurisdiction.

I.

LOCAL TAXATION IN CALIFORNIA OF PROPERTY LEASED AND USED BY A TELEPHONE COMPANY IN ITS OPERATIONS IS INVALID UNDER THE STATE LAW.

First: Preliminary considerations.

A. Outline of the former system of taxation in California.

Prior to 1910 there was in California generally speaking no separation of subjects of state and local taxation. State revenues, save for comparatively small amounts derived from such sources as the poll tax, inheritance tax and miscellaneous fees, came, like local revenues, from *ad valorem* taxes on property.

The state and the various counties and municipal bodies had their respective tax rates. Valuation and assessment were largely local affairs, the state tax rate and the several local tax rates being alike applied to valuations

fixed by local assessors. The State Board of Equalization had equalizing powers over the local assessments and the Board also assessed railroad lines running through more than one county (see Political Code, Sec. 3664, et seq., prior to 1911).

B. Creation and work of the Commission on Revenue and Taxation and outline of the present system of taxation under which, as part of the plan for separation of the sources of state and local revenues, certain public utilities pay the state fixed percentages of their gross receipts in lieu of all other taxes and licenses on their properties used in operation.

The old system of taxation having led to serious abuses and inequalities, the legislature in 1905 provided for a Commission on Revenue and Taxation to devise means of reform (Stats. 1905, p. 390). The Commission, which was continued by legislation in 1909 (Stats. 1909, p. 779), mapped out the system now in effect. This system is embodied in section 14 of article XIII of the state constitution, adopted at the election of 1910, after a substantially similar measure (*Story v. Richardson*, 186 Cal. 162, 165, 198 Pac. 1057) had been defeated in 1908.

The Commission on Revenue and Taxation made two reports, one in 1906 and the other in 1910, which are official publications of the state (Appendix to Journals of Senate and Assembly, 37th Session, 1907, Vol. 2, and 39th Session, 1911, Vol. 1). They also appear in separate publications issued by the state.

Being part of the legislative journals, they are, we think, clearly within the judicial knowledge of this court (*Town of South Ottawa v. Perkins*, 94 U. S. 260, 268; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414; *Lamar v. Micou*, 114 U. S. 218, 223; *Connole v. Norfolk etc. R. Co.*, 216 Fed. 823, 825).

We have printed as Appendix II to this brief, Chapter 3 of Part III of the 1906 report, entitled "Gross Earnings Tax in Theory and Practice". Other relevant parts of this report and of the 1910 report are printed from time to time as part of our argument.

These reports are recognized as authoritative sources by the State Supreme Court. In *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 Pac. 502, the court said (172 Cal. 351):

> "The state had appointed a learned commission on revenue and taxation, whose labors extended over many years. In 1906 they promulgated their first report. In 1910 they put forth their second report. These reports were most widely distributed, at the state's expense, with the avowed purpose of educating its people to a knowledge of the reasons why the change in the method of taxation of public service corporations, banks, insurance companies, etc., was deemed most desirable, and to an understanding of the benefits which follow the adoption of the new method. Those reports themselves are official publications of the state (Appendix to Journals of Senate and Assembly, 39th Sess., 1911, Vol. 1)."

In *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, the court said (186 Cal. 165):

> "The provision of the constitution here under consideration was adopted by the people of the state at the election of November, 1910, as the result of a movement to separate state and local taxation. In 1905 a commission was authorized to investigate the system of revenue and taxation in force in this state and recommend a revision thereof (Stats. 1905, p. 390). The commission appointed proposed an amendment to the constitution (Report of the Commission on Revenue and Taxation of the State of California, 1906, vol. 2, Appendix to Journals of Senate and Assembly of California, Session 1907). In 1910, after some alterations, the amendment was submitted to

the people and adopted by them. The amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions."

See also:

Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 423, 143 Pac. 700;

Union Tank Line Co. v. Richardson, 183 Cal. 409, 413, 191 Pac. 697;

Pullman Co. v. Richardson, 185 Cal. 484, 504, 507, 197 Pac. 346 (Aff. 261 U. S. 330);

Bankers Life Co. v. Richardson, 192 Cal. 113, 119, 218 Pac. 586.

As "the first step in reform" (*Report of Commission on Revenue and Taxation*, 1906, p. 11), the constitutional amendments of 1910 adopted the principle of separation between the subjects of state and local taxation, by which the state and the various municipal bodies were to obtain their revenues from distinct sources and the subjects of taxation by the one were, generally speaking, to be relieved of taxation by the other.

Under the separated system the principal sources of state revenue were to be the gross receipts tax to be paid by certain public utilities, the tax on bank stocks, the tax on insurance premiums and the tax on corporate franchises (*Report of Commission on Revenue and Taxation*, 1906, p. 11).

The reasons for adopting the plan of taxing these public utilities for state purposes exclusively and upon the basis of their gross receipts are set out in the reports of the Commission on Revenue and Taxation. They were

generally discussed by the Circuit Court of Appeals in its opinion (Tr. pp. 44-46) and they have also been discussed by the State Supreme Court in *San Francisco v. Pacific Telephone etc. Co.*, 166 Cal. 244, 135 Pac. 971; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351, 156 Pac. 502 and *Story v. Richardson*, 186 Cal. 162, 165, 166, 198 Pac. 1057. A detailed statement of them is not within the proper scope of this brief, but they may, we think, be topically summarized, with substantial accuracy, as follows:

1. A gross receipts tax is preferable to other methods of taxation:

(a) because of its practical advantages (*Report of Commission on Revenue and Taxation*, 1906, pp. 91-93, 157, et seq; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 425, 143 Pac. 700);

(b) because gross receipts, besides reflecting the value of the property used, also necessarily reflect going concern value and other intangible property of public service corporations which cannot be fairly taxed under the old system (*Report of Commission on Revenue and Taxation*, 1906, pp. 12-13; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 423, 424, 143 Pac. 700; *Story v. Richardson*, 186 Cal. 162, 166, 198 Pac. 1057); and

(c) because a gross receipts tax "would result in a far closer approximation to justice and equality than any other tax which the State could select" (*Report of Commission on Revenue and Taxation*, 1906, p. 92).

2. The gross receipts tax must be for state purposes exclusively and in lieu of all local taxation:

(a) because the state is the only instrumentality capable of administering such a tax (*Report of Commission on Revenue and Taxation*, 1906, pp. 81-82);

(b) because the revenue derived in taxes from large general organizations, like railroad and telephone companies, which, in their essential nature, are general, not local (*Report of Commission on Revenue and Taxation*, 1906, pp. 6, 14, 77; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351-352, 156 Pac. 502), justly belongs to the state and the localities have no equitable claim to it (*Report of Commission on Revenue and Taxation*, 1906, p. 10; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351-352, 156 Pac. 502); and

(c) in order to relieve public utilities of the unequal and unjust burdens resulting from multiple local taxes and assessments (*Report of Commission on Revenue and Taxation*, 1906, pp. 60, 88; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 423, 143 Pac. 709), and also to relieve them from such questionable practices as gerrymandering "shoestring" school and irrigation districts along the lines of railroads or around other property of public utilities (*Report of Commission on Revenue and Taxation*, 1906, p. 88).

The new state tax, though measured by gross receipts, was in no sense regarded as an earnings or income tax on public utilities. The Commission framed it as a property tax, and the State Supreme Court has since definitely and repeatedly held it to be such (infra, p. 35). The tax was laid upon all property contributing to operating

revenues, and *the rates were specifically computed to yield a fair tax on all property used by public utilities in public service, whether owned or leased or howsoever held* (infra, pp. 23-34). As stated by the Commission, the gross receipts tax was therefore

> "to be in lieu of all other taxes except taxes on property not necessarily used in the operations conducted by the companies" (*Report of Commission on Revenue and Taxation*, 1906, p. 12).

In recompense for property to be thus withdrawn from local taxation, the constitutional amendments of 1910 provided that all other property should be withdrawn from state taxation, and should be subject only to local taxation (*Report of Commission on Revenue and Taxation*, 1906, pp. 87-90). By adding to the local rate on property subject to local taxation such part of the former state rate on such property as might be necessary, the localities could make up for loss of taxes on property withdrawn from local taxation because used by public service corporations, without increasing the total tax burden on the property remaining subject to local taxation. Except for one or two sparsely settled counties, which derived their chief revenues from long stretches of railroad track (*Report of Commission on Revenue and Taxation*, 1906, pp. 87-88) the new system was computed to result in substantial tax savings for the municipal bodies of the state (*Report of Commission on Revenue and Taxation*, 1906, pp. 88-90, 1910, pp. 20-37, 55-77).

Such in brief was the purpose and intent of the framers of the constitutional amendment.

C. Quotations from the state constitutional and statutory provisions regarding the gross receipts tax.*

Section 14 of article XIII of the constitution, omitting enumeration of other public utilities than telephone companies, provides in part as follows:

> "Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon * * * telephone companies * * * and taxes upon all franchises of every kind and nature, *shall be entirely and exclusively for state purposes*, and shall be levied, assessed and collected in the manner hereinafter provided. * * *
>
> (a) * * * all telegraph and telephone companies * * * shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof, *used* exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this state.
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> * * * * * * *
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> *Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies* except as otherwise in this section provided;**
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> * * * * * * *
>
> (f) All the provisions of this section shall be self-executing and the Legislature shall pass all laws necessary to carry this section into effect" (italics ours).

Section 3665a of the Political Code defines "gross receipts from operation" as including "all sums received from business done within this state", without deductions of any kind except for refunds for errors or over-

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* These provisions are quoted in full in Appendix I.

** The exception is to pay bonded debts, or interest thereon, outstanding when the amendment was adopted.

charges. The same section provides that income from "nonoperative property" shall not be included in gross receipts and further provides that the Board of Equalization shall make allowances necessary to avoid double taxation.

Section 3664a fixes the tax to be paid by telephone companies at five and a half per cent. of their gross receipts.

Section 3665b defines "operative property", on which the gross receipts tax is in lieu of all other taxes. Operative property of telephone companies includes (Subd. "d"):

> "The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings *used* in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings" (italics ours).

The same section also provides (Subd. "e"):

> "* * * the operative property of the companies enumerated in this section, shall also include any other property not above enumerated that may be reasonably necessary for *use* by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section three thousand six hundred sixty-four *a* of this code" (italics ours).

Following sections prescribe the procedure for the filing of reports by public utilities with the State Board of Equalization, for the assessment of gross receipts taxes by the Board, for the lien of the tax and for other matters.

Second: The question here involved is an open one in the state courts. Under the settled rule of the State Supreme Court the effect of the order granting a rehearing in the case of Pacific Telephone & Telegraph Co. v. State Board of Equalization, 74 Cal. Dec. 96, was to "vacate the previous opinion and judgment and set the whole matter at large".

Petitioners' argument that the validity of local taxation of leased property used by public utilities in California has been established by the State Supreme Court in the case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, is, we submit, completely answered by the fact that the decision and opinion in that case were vacated and set aside by the order made on August 1, 1927, granting the petition for rehearing (see state court minutes, following 74 Cal. Dec. 178). This court accords no greater effect to a state decision than the state court which rendered it (*Wright v. Georgia R. and Banking Co.*, 216 U. S. 420, 429).

In *Argenti v. San Francisco*, 16 Cal. 255, the court said in an opinion delivered by Chief Justice Field, later Justice Field of this court (p. 276):

> "It may be observed here, before proceeding to consider these contracts, that the opinion rendered in *Seale v. The City of San Francisco*, at the July term, 1858, to which reference is made, *never became authority*. A rehearing was granted in that case, and no one is better aware than the learned counsel for the defendant, that *when a rehearing is granted, the opinion previously delivered falls, unless reaffirmed after the reargument. Until such reaffirmance, the opinion never acquires the force of an adjudication, and is entitled to no more consideration than the briefs of counsel*" (italics ours).

In the recent case of *Miller & Lux Incorporated v. James*, 180 Cal. 38, 179 Pac. 174, the court said (180 Cal. 48):

> "The first decision rendered upon the appeal (47 Cal. Dec. 1) was vacated by the order granting a rehearing, and is not reported in the California Reports. While it is true that the order granting such rehearing limited the argument to the question of the effect of the public user, the order, nevertheless, *vacated the previous opinion and judgment and set the whole matter at large.*"

See also:

Welton v. Cook, 61 Cal. 481, 487;

Poppe v. Athearn, 42 Cal. 606, 610 (Reporter's Note).

It may further be noted that an opinion in a case in which a rehearing has been granted is not published in the official California reports (*Miller & Lux Incorporated v. James*, 180 Cal. 38, 48, 179 Pac. 174).

No further action was taken in the *Pacific Telephone* case after the granting of the petition for rehearing, because the controversy had become moot. The suit involved an application for mandamus to compel the State Board of Equalization to put property leased and used by the applicant on the 1927 "operative roll", that is to say, upon the list of property subject only to state taxation (Political Code, Sec. 3668a). This roll is delivered by the Board to the State Treasurer on the first Monday in July (Political Code, Sec. 3668a). The Supreme Court rendered its opinion denying the application for mandamus on July 2, 1927, which was the Saturday preceding this Monday. The Board thereupon delivered the roll. Inasmuch as

the relief sought by applicant could not be thereafter granted (*San Diego etc. R. Co. v. State Board of Equalization*, 164 Cal. 41, 127 Pac. 153), it is obvious that the only possible purpose of granting the rehearing on August 1, 1927, was to reopen the important question as to the local taxability of leased operative property.

The mandamus proceeding having thus become moot, there was nothing for the Telephone Company to do except to dismiss it. The state court has repeatedly held that it will not decide moot questions and that moot cases will be dismissed (*Estate of McSwain*, 176 Cal. 287, 168 Pac. 117; *Matter of Ambrose*, 170 Cal. 160, 149 Pac. 43; *Wright v. Board of Public Works*, 163 Cal. 328, 125 Pac. 353; *Bradley v. Voorsanger*, 143 Cal. 214, 76 Pac. 1031).

Third: Local taxation of property leased and used by public service corporations is contrary to the fundamental principles of the gross receipts method of taxation, as explained by the Commission on Revenue and Taxation and established by decisions of the State Supreme Court.

A. The rates of the gross receipts tax were so fixed as to make that tax equivalent to a just tax on all property used in operations by public utilities whether owned or leased.

The Commission on Revenue and Taxation carefully considered the status of leased property in fixing the percentages of their gross receipts which the several public utilities should pay, and *it fixed these percentages so as to make the gross receipts tax equivalent to a fair tax on all property used in operations, whether owned or leased.* That fact is, we submit, in itself a complete demonstration that local taxation of leased property used

by public utilities is theoretically indefensible and fundamentally unjust.*

That the rates were fixed in the manner stated is established beyond all question by the reports of the Commission. For the sake of clarity, we will trace step by step the matters which led the Commission to consider the question here in issue, and to declare that the gross receipts tax is in lieu of all other taxes on operative property, whether owned or leased.

As a preface to its explanation of the way in which the rates of gross receipts taxation were fixed, the Commission mentioned the necessity for making this gross earnings tax "just and fair compared with other taxes" (*Report of Commission on Revenue and Taxation*, 1906, p. 91, also p. 168, et seq.). The Commission said (p. 93):

> "EQUAL TAXATION.
>
> In all of those states in which, in recent years, a change has been made in the taxation of public-service corporations, either from the ad valorem system to a gross earnings tax, or from a gross earnings tax back to an ad valorem system, or in which any substantial change or reform has been suggested in regard to the taxation of public-service corporations, the question has always been raised whether the proposed rates or methods of taxation for such companies would result in 'equal taxation'. It is difficult to determine exactly what is meant, in this connection, by 'equal taxation,' but in the popular mind, as expressed during the discussions of such proposed reforms, there has been an idea that, by whatever method a railroad, for example, may be taxed, the burden of taxation thereon should be, and must be,

*The state court in its opinion in the *Pacific Telephone* mandamus case did not mention the subject of the rates of the gross receipts tax having been fixed to include taxes on leased operative property. This is readily explained, however, by pointing out that the matter though adverted to at the oral argument was not emphasized until in the petition for rehearing

as heavy as that which is borne by a farmer or by an owner of real estate and personal property on the regular assessment rolls. The idea seems to be that if the tax is levied upon the gross earnings, it must result in the imposition upon a railroad or other public-service corporation of a burden fairly equal to that which it would bear if fully assessed on an ad valorem basis as any other property might be.

In view of the strength of the popular feeling that taxes should be 'equal', and of the obvious and essential justice of such a demand, *is highly important to discover a practical method for determining whether the burden of a tax which it is proposed to impose upon the gross earnings of a given class of corporations is the equivalent or not of a tax which might be levied under an ad valorem plan.* Such a method has been devised by this Commission. By the application of this method we can ascertain what rate of tax on the gross earnings is the equivalent of a given tax rate on the property, and *vice versa*" (italics ours).

Before quoting the Commission's statement of the method to which it thus referred, we point out that any comparison of the gross receipts tax with a fair tax on other property obviously involves a valuation of the property on which the gross receipts tax is to rest. Such a valuation the Commission made by using *net* earnings as a basis. This does not mean that it compiled net earnings statements of all public utilities which were to pay the gross receipts tax. Instead, as a measure of value, it ascertained and took into account the proportions usually obtaining between gross and net earnings from the operative property of various classes of public service corporations.

The Commission found that public service corporations fall into distinct classes with respect to the percentage

between gross earnings and net earnings. Railroads, for instance, have a higher percentage of net earnings than telephone companies, which in turn have a higher percentage than express companies.

The value of property, of course, ultimately depends on its net earnings (*Cleveland etc. R. Co. v. Backus*, 154 U. S. 439, 445; *Pullman Co. v. Richardson*, 185 Cal. 484, 496, 197 Pac. 346). Capitalizing net earnings at a proper interest rate gives the value of the property. Since, as the Commission found, the proportion between gross earnings and net earnings of the various classes of public service corporations can be ascertained, the value of the property to be taxed by the gross receipts method has an ascertainable relation to gross earnings and can be approximately valued from its gross earnings. By fixing the gross receipts tax at a rate sufficient to yield a fair tax on such value, the gross receipts tax would be made "equal" to the burdens on property taxed on the *ad valorem* plan.

The foregoing considerations underlie the Commission's method for ascertaining what tax rate on gross earnings is approximately the equivalent of a given rate of taxation of property. This method it explained as follows (*Report of Commission on Revenue and Taxation*, 1906, pp. 94-95):

> "Briefly stated that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the

percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property.* *This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion.* But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions (italics by the Commission).

CLASSIFICATION OF CORPORATIONS.

The first step in the application of this method by the Commission was the determination of the class to which a corporation belongs by virtue of the percentage which its net earnings bears to its total gross earnings. An examination of the accounts of different classes of public-service corporations showed that they fall into very distinct classes according to the percentage which their net earnings bear to their gross earnings. This does not mean that every company belonging to a given class has the same percentage of net earnings to gross. But merely that *each of the great classes of public-service corporations presents a type* to which the individual companies tend to conform, and from which they differ only while young or while for some other reason incomplete or imperfect.

Thus, for example, we found that railroad companies, operating steam railroads, normally pay about 64% of their gross earnings for operating expenses, leaving 36% to pay interest upon bonded indebtedness, dividends upon capital, and similar items. That is, out of every $100 received, $64 goes to pay for wages, fuel, maintenance of way and equipment, and other items of cost involved in operation, and $36 is left for payment of interest on bonds, dividends on stock, and similar items. It is this $36 which gives value to the property. For fifteen years this average rate had not

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*"Expressed algebraically, let t equal the tax rate sought, n equal the percentage of net earnings to gross, i equal the interest rate on the investment, and r equal the given tax on property; then: $t = \frac{n}{i} \times r$" (footnote by the Commission).

varied in the United States as a whole more than two points. City water companies, to take another example, ordinarily have a very much lower percentage of operating expenses, often as low as 25%, and consequently have as high as 75% net earnings, or funds available for the payment of interest and dividends. Other classes of corporations again, such as the telephone companies and express companies, have relatively high operating expenses and only a small proportion of net revenues. As it is the amount of net revenue which determines the value of the property of these corporations as of any other property, so on the well-known principle of 'capitalizing' the income at a predetermined or agreed rate of interest, it will readily be seen that a corporation with net returns large in proportion to its gross earnings has a larger property or capital value than one with a smaller percentage of net earnings. For example, as has been said, railroads earn about 36% net out of all receipts, and if this were capitalized at 6% would have $600 of capital for every $100 of gross earnings; another class of corporations earning, say, 24% net, would, if capitalized at 6% have $400 worth of property for every $100 of gross income, while a city water company with 60% net, if capitalized at 6% would have $1000 worth of property for every $100 of gross income. If, however, 8% be taken as the rate of interest constituting a fair return to be allowed the stock and bond holders upon their investment, and as the basis for capitalization, these sums would change, and railroads with 36% net would have $450 of capital for every $100 of gross earnings; a company with 24% net would have $300 of capital for every $100 of gross earnings, and a water company with 60% net would have $750 for every $100 of gross earnings.

Computing the Tax Rate.

In order to compute what rate of taxation on gross earnings is the equivalent of a given rate of taxation on the property, we have simply to divide the percentage of net earnings by the assumed rate of capitalization and multiply the result by whatever tax

rate on the property we wish to compare the gross earnings rate with. Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½% on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8, whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6%, 9% as an equivalent rate on gross earnings, or at 8% as a basis of capitalization, 6¾%. If the tax rate on property or capital were fixed at 1%, the above rates would become 6% and 4½%."

The foregoing quotations make it clear that the Commission on Revenue and Taxation regarded gross receipts as merely the measure of the tax to be paid by public service corporations; the tax itself, in its essential nature, was to be *a fair tax on property valued by net earnings*. This consideration squarely raised before the Commission the questions involved in the case at bar, namely: On what property does the gross receipts tax rest? Does it include leased property? *The Commission said that the gross receipts tax does include taxes on leased property; it pointed out that this is necessarily so, because the property subject to the tax is valued on the basis of net earnings, and in capitalizing net earnings to establish such value the earnings of leased property are included without deduction for rents, thus inevitably including leased property in the value reached.* The Commission said (*Report of Commission on Revenue and Taxation*, 1906, pp. 95-96):

"Net Earnings Defined.

In applying the above method it is obvious that we must have a fixed and uniformly applied definition of what constitute net earnings. Since the object of ascertaining the net earnings is to ascertain from them

the value of the property, it is obvious that the net earnings should include *all things* and only such things *as belong to the owners of the property, whether they be the stockholders, or the bondholders, or the lessors of property used by the corporation* (our italics). Hence the operating expenses, which are deducted from the gross earnings in order to ascertain the net earnings in this sense, should include only the bare expenses of operation and of maintenance to the narrowest sense of those terms. The operating expenses would include, in the case of a railroad, only the items which are denominated and defined by the Interstate Commerce Commission as 'maintenance of way and structures,' including: 'repairs of roadway and renewal of rails and ties,' 'repairs and renewal of bridges and other structures'; 'maintenance of equipment,' 'conducting transportation,' including: 'salaries and wages in the operating department,' 'supplies,' 'car mileage,' 'switching charges,' 'damage for injuries,' 'advertising,' 'outside agencies and commissions'; and 'general expenses.' They would not include: 'taxes,' 'rental of tracks and terminals,' 'interest on bonds,' nor 'balances available for dividends.' These terms, so far as they apply to railroads, have been carefully defined, for the United States at large, by the Interstate Commerce Commission, and for California by our own State Board of Equalization, and in general are fully understood and applied by all more careful accountants. Precisely analogous items are carried in the accounts of almost all public-service corporations, and the accounts can always be segregated under similar divisions.

Rents or Rental Charges Not Included Among Operating Expenses.

Some corporation officers have argued before the Commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on*

> PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included. All persons readily admit that interest on bonded indebtedness is not an operating expense; if that is the case, rent is not an operating expense. It would have made no difference, so far as this matter is concerned, whether the Southern Pacific built the Lucin cut-off, as it did, with the proceeds of bonds on which it pays a certain sum annually as interest, or had leased that great bridge from some other company, paying the same sum annually as rent. In neither case would the annual payment be an operating expense; in each case it is a return to property" (emphasis by the Commission).

It would be difficult to state more plainly than did the Commission that the gross receipts tax rests on all property used in operations, including leased property. A tabulation, however, of the steps in the rate fixing process may perhaps further illustrate the strict logic of the Commission's statement that no other conclusion is possible. The steps were:

1. Ascertain gross receipts from operations.

2. Subtract from gross receipts expenses of operating and maintaining all *property in use*, but not rents and interest which are costs of the operating company, and which are not costs of operating the property making up the system (*Report of Commission on Revenue and Taxation*, 1906, p. 96). This gives net *operative* earnings, not of the public service corporation as such, but of all the *property* in use, whether leased, owned or howsoever held.*

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*"Since the object of ascertaining the net earnings is to ascertain from them the value of the property, it is obvious that the net earnings should include all things and only such things as belong to the owners of the property, whether they be the stockholders, or the bondholders, or the lessors of property used by the corporation" (*Report of Commission on Revenue and Taxation*, 1906, p. 95).

3. Capitalize (2), thus obtaining the value of the *operative* property. Since the starting point is all gross receipts from operations, and the only deduction in (2) is operating expenses, *exclusive* of interest and rents, the value reached in (3) can be no other than that of *all property used to obtain operative receipts.* It is *impossible to capitalize earnings from leased property, making no deduction for rents, without reaching a value which includes rented property.*

4. Fix the rates of the gross receipts tax so as to make it a fair tax on the value of the property ascertained in (3)*, which includes leased property.

The importance of recognizing the essential and inherent nature of the gross receipts tax as a tax on *property contributing to operating revenues* will, we trust, justify another reference to the controversy before the Commission on Revenue and Taxation regarding the deduction of rents (supra, pp. 30-31). That controversy, as already appears, arose in connection with the determination of net earnings for the purpose of fixing values and from them, the rates of the gross receipts tax. Why should the officers of public utilities have argued for the deduction of rents in determining net earnings? Obviously and solely to obtain lower rates of gross

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*The Commission found that property in general throughout the state paid on an average an annual *ad valorem* tax equal to about one per cent of its true value. It was this figure which the Commission used as a standard of comparison in computing such rates for the gross receipts tax as to make the same approximately "equal" to taxes on property in general (*Report of Commission on Revenue and Taxation*, 1906, p. 99, *et seq.*).

The rates of the gross receipts tax, as adopted in 1910, have since been increased from time to time. In 1921, when the Legislature, along with other increases, increased the percentage tax of telephone companies to its present figure of five and a half per cent (Political Code, section 3664a), it declared in the statute that it was adjusting the rates of the gross receipts tax so as to make the tax burdens under it equivalent to those on property in general throughout the state (Cal. Stats. 1921, pp. 24-25).

receipts taxes. If rents were deducted, there would be lower net earnings and lower net earnings meant a lower valuation of the property on which the gross receipts tax would be laid; consequently, that a lower percentage of gross receipts would be required to yield a fair tax on that value. The Commission rejected the argument of the public utilities for deduction of rents saying (*Report of Commission on Revenue and Taxation*, 1906, p. 96):

> "This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on* PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included" (emphasis by the Commission).

The controversy about rents involved in its ultimate analysis two contrary conceptions of the gross receipts tax. The Commission regarded the tax as fairly equivalent to a tax on *all property contributing to operating revenues;* the public service corporations argued as though it were equivalent to *an income or earnings tax on themselves.* There is, of course, a manifest difference between a tax measured by *the earnings of a corporation* and a tax measured by *the earnings of all property used by the corporation.* The one excludes leased property; the other necessarily includes it (*Atlantic Coast Line v. Daughton*, 262 U. S. 413, 420), and it was the latter that the Commission on Revenue and Taxation expressly and specifically declared the gross receipts tax to be.

The theory on which the rates of the gross receipts tax were fixed is, of course, an important part of the state law. In *Pullman Co. v. Richardson*, 185 Cal. 484 (Aff. 261

U. S. 330) the court quoted (pp. 504, 506) various passages from the 1906 report of the Commission on Revenue and Taxation which we have quoted and said (p. 504):

> "The tax commission in its report of 1906 to the legislature furnished the proper rate of taxation based on the gross receipts in order to properly tax the property of the various corporations involved in the amendment."

Petitioners refer to the Commission's discussion of rents and leased property, and quote (Petitioners' Br. p. 150) the passage from the 1906 report containing the statement that the gross receipts tax is

> "to be *in lieu of all taxes on* PROPERTY USED IN OPERATION" (emphasis by the Commission).

This language, they say, was used "not for the purpose of showing the rate of final taxation, but to ascertain what the true value of the corporate franchise was" (Petitioners' Br. p. 151). No reference to any passage in the reports of the Commission or other source or authority is or could, we think, be given to support this assertion.

B. The gross receipts tax is essentially a property tax substituted for other taxes on the property which produces gross receipts. It must rest on all property, including leased property, which contributes to the gross receipts.

This State Supreme Court has repeatedly held that the gross receipts tax is a tax substituted for all taxes which were or might have been levied on the same subject matter. The court describes it as a "legal and commutated or substituted tax for other taxes which were or might have been levied" (*Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 425, 143 Pac. 700); as a method "substituted

for the former system" (*San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 248, 135 Pac. 971); as a "tax substituted and commutated for the different *ad valorem* taxes" (*Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 352, 156 Pac. 502); as "a legal and commutated or substituted tax for other taxes" (*Pullman Co. v. Richardson*, 185 Cal. 484, 489, 197 Pac. 346).

The other taxes for which the gross receipts tax was substituted included license and other charges (*San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 248, 135 Pac. 971); but the main tax for which it was substituted, was the *ad valorem* property tax. As already pointed out, the Commission on Revenue and Taxation framed the gross receipts tax as essentially a property tax (Report of Commission on Revenue and Taxation, pp. 91, 102, 200, 201), and the State Supreme Court has always so regarded it. Thus, in *Pullman Co. v. Richardson*, 185 Cal. 484, 197 Pac. 346 (aff. 261 U. S. 330), the court said (p. 487):

> "The question as to whether or not the taxes levied by Section 14, Article XIII of the constitution are taxes upon property rather than upon receipts or income has several times been considered by this court and in each instance it has been declared to be essentially a property tax."

See also:

Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 424, 143 Pac. 700;

Payne v. Richardson, 189 Cal. 103, 106, 207 Pac. 547.

Being a property tax, the gross receipts tax must, we submit, rest on all property which contributes to gross receipts. The fallacy of a contrary contention is clearly

shown by assuming the case of a public utility leasing all of the property which it operates. Under the contention of petitioners, the gross receipts tax of such a company would anomalously be a property tax not resting on any property, except possibly going concern value.

So too, the fact that the gross receipts tax is a *substituted* tax necessarily assumes some pre-existing tax for which it was or could have been substituted. But, under petitioners' contention, leased property used by public utilities pays an *ad valorem* tax just as it did when under the former system. There is, therefore, nothing for which that part of the gross receipts tax reflecting earnings from the leased property could have been substituted.

Petitioners argue that, even if a public utility leased all of the property it used, its gross receipts tax would still be a property tax resting upon the going concern value and similar intangible property. There is, of course, no doubt that such intangible property should be and is taxed. It is also obviously true that properties owned by a public utility may be enhanced in value by reason of the fact that they are operated in conjunction with leased properties. But it is equally obvious, we submit, that $1000 worth of owned property cannot be taxed as if it were worth $100,000 simply because it is operated in conjunction with $99,000 worth of leased property.

C. Operative leased property contributes to gross earnings, and, therefore, to gross receipts taxes, in precisely the same way as if owned. If respondents owned the "talking sets" they would pay the same gross receipts taxes as they now pay. The gross receipts tax is, therefore, upon the whole value of property in use.

If respondents owned the "talking sets" involved in this suit, admittedly petitioners could not assess them.

But respondents, in that event, would pay in taxes exactly the amount that they now pay, that is, the same percentage of their gross receipts. That percentage, therefore, necessarily includes the tax on the "talking sets," just as an assessment to a reversioner of the whole value of land includes the value of any outstanding leasehold (*Trimble v. Seattle*, 231 U. S. 683, 689; *San Pedro, etc., R. Co. v. Los Angeles*, 180 Cal. 18, 22-25, 179 Pac. 393).

This was pointed out by the Circuit Court of Appeals. That court said (Tr. p. 46):

> "While courts will not concern themselves with the economic policy pervading a state statute, they may properly consider that in taxing gross receipts upon all operative property in use *there is really a payment of substitution tax upon the whole value of the property in use.*" (Italics ours).

In *Merrill Ry. & Lighting Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686, in which it was held that leased property of street railroad companies could not be locally taxed, in view of the statutory provisions imposing a gross receipts tax in lieu of other taxation, the court said (96 N. W. 687):

> "What difference would it make that his power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto *of this particular property.* Why should the legislators care whether the dynamos in the power house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded."

The California Supreme Court, as stated by the Circuit Court of Appeals (Tr. p. 46), has emphasized the importance of *use* in determining whether property is sub-

ject to state or local taxation. In *Pullman Co. v. Richardson*, 185 Cal. 484, 197 Pac. 346, the court said (p. 507):

> "In making the comparisons of values another fact must also be considered, namely, that the gross revenue method includes *all operative property*."

In *San Bernardino County v. State Board of Equalization*, 172 Cal. 76, 155 Pac. 458, the court said (p. 78):

> "The prime requisite for property properly classified as 'operative' is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision (a) of section 14 of article XIII of the constitution."

D. Local taxation of leased operative property is contrary to the principle of separation of state from local taxation.

Under the principle of separation between the subjects of state and local taxation an obviously important factor, in determining what property the state should tax and what property should be taxed locally, is whether the property is general or local in character.

In the introduction to its 1906 report the Commission on Revenue and Taxation said (p. 6):

> "Every year sees some state or states move in the direction of the separation of state from local taxation as to sources of revenue and the abandonment of the old general property tax as applied to public service corporations whose business is general rather than local in character."

And again, in enumerating the faults in the old system, the Commission said (Report, 1906, p. 10):

> "14. The present system takes the revenue derivable by taxation from large general organizations, like the railroads, which revenue belongs by right to the people of the State at large, and distributes it most

inequitably among the local divisions of the State which have no proper claim to it whatsoever."

In dealing with the subject of separation it said (Report, 1906, pp. 77-78):

"The separation of State from local taxation as to sources of revenue has come to be generally recognized as the one feasible pathway for tax reform.

As this Commission uses the term 'separation of sources' it means that the counties and local governments shall tax only the private or individual real estate and tangible property within their boundaries, property, that is, *which is clearly and distinctly localized*. This class of property has a distinctly local situs and benefits obviously and directly by local government. Upon this class of property there shall ultimately be no State tax. The State, on the other hand, shall tax all those industries, and *classes of property* sometimes called 'corporate' to distinguish them from 'private or individual' industries and properties. * * *

The general, non-local, character of corporate property is so obvious that it seems almost superfluous to argue that the taxes thereon do not belong to the localities. But as this idea is comparatively new in practice it may need illustration. A carload of butter and cheese may be shipped from Humboldt county by water to San Francisco and thence by rail to New Orleans. On its way it will pass through many counties. We should hold it robbery if each county erected tollgates and collected tolls on that carload of Humboldt products. But that is practically what we allow when we permit the counties to tax the railroads.

* * * * * * *

Does the fact that San Bernardino county, Nevada county, and Siskiyou county sit at the gateways through which the railroads enter the State give them a right to tax every yard of cloth, every box of crackers, every plow, and all the other multitudinous wares which the people of this commonwealth bring in? Many counties not situated on the line of any

railroad nevertheless contribute to its traffic. By what right are they to be deprived of the taxes levied on this traffic? If the railroads are taxed by the State alone and for State purposes alone, every dollar of taxable property in the State, whether on the line of the railroad or not, is benefited, for the amount paid into the State treasury from this source lessens the tax on all property in the State.

* * * * * * * * *

Obviously there is a perfectly clear line of demarkation between property local in character which should be subject to local taxation *and property or industries general in character* which should be subject to general or State taxation. (Italics ours).

To accomplish separation it is necessary to define clearly and sharply the boundary line between State and local powers of taxation. This boundary line having been once defined, neither of the two parties shall trespass upon the territory set apart for the other."

The separated system thus contemplates "that the counties and local governments shall tax only * * * property * * * which is clearly and distinctly localized" (*Report of Commission on Revenue and Taxation*, 1906, p. 77), while "property or industries general in character * * * should be subject to general or state taxation" (Report, 1906, p. 78). The State Supreme Court has expressly so held in the case of *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 Pac. 502.

It is utterly unreasonable to say that property *owned and used* by public utilities is "general in character" and at the same time to say that property *leased and used* by such public utilities for the same purposes is "clearly and distinctly localized". The case at bar affords a striking illustration on this point. Certainly it cannot be said that the stand of a telephone instrument is general in charac-

ter and subject only to state taxation, but that the receiver of the same instrument "is clearly and distinctly localized" so that the county can tax it. Yet, unless such a proposition can be maintained, there is no escape from the conclusion that local taxation of leased operative property is contrary to the fundamental principle of separation.

Fourth: Section 3665B of the Political Code provides that property used in the telephone business is operative property and not subject to local taxation. Other sections of the code, by necessary inference, are to the same effect.

We have quoted subdivisions "d" and "e" of section 3665b of the Political Code which, in defining property not subject to local taxation, include property "used" in the telephone business (supra, p. 20). These provisions in themselves are, as we contend, and as the Circuit Court of Appeals held (Tr. pp. 45-46), decisive of the case, unless the court holds them contrary to the state constitution.

But section 3665b is not the only section which shows that leased property used by a public service corporation is not taxable locally. By necessary inference subdivision 4 of section 3665a leads to the same conclusion. It provides:

> "Income From Nonoperative Property Not Included.
>
> Income derived from property not defined in this section and in sections three thousand six hundred sixty-four *a*, three thousand six hundred sixty-five *b* and three thousand six hundred sixty-five *c* of this code as operative property *shall not be included in the gross receipts for the purpose of determining the tax on the property and franchises provided for in section three thousand six hundred sixty-four a of this code*" (italics ours).

It should be remembered that the code sections use the words "operative" and "nonoperative" to describe, respectively, property subject only to state taxation and property subject only to local taxation. If, therefore, leased property used in operations, is nevertheless to be regarded as "nonoperative", then necessarily under the express provisions of subdivision 4 of section 3665a respondents would be entitled to deduct from the gross receipts which they report to the State Board such revenues as they derive from the "talking sets."

To permit such deduction, however, would be counter to the theory of the constitution and statutes.

Deductions from gross receipts of revenues from *leased* property in use, as the code would require, if leased property were "nonoperative", could be made only in the face of great practical difficulties. Certainly, no method readily suggests itself for determining how much revenue a telephone company derives from parts of a telephone instrument.

These practical considerations strongly indicate that neither the framers of the constitutional provision nor the legislature intended that the revenues from the operation of leased property should be deducted from gross receipts. One of the important reasons for adopting the gross receipts tax rather than a net earnings tax was to avoid exactly this kind of practical difficulty (*Report of Commission on Revenue and Taxation*, 1906, pp. 91-92). It is, therefore, only reasonable to suppose that the legislature would not have unqualifiedly provided in subdivision 4 of section 3665a for the deduction of income from nonoperative properties, if it had considered leased property as nonoperative.

Fifth: Petitioners treat this case as involving a tax exemption. But the gross receipts tax is a substituted tax; not a tax exemption. Its provisions are to be construed liberally without leaning to the side of the taxing power; not against the taxpayer like tax exemption laws.

Petitioners repeatedly characterize our position as a claim for "exemption" from taxation of the leased "talking sets" (Petitioners' Br. pp. 159-164). The only reason for this, that we can see, is to invoke by suggestion the irrelevant rule that tax exemption laws must be strictly construed against the taxpayer.

It is thoroughly settled that the gross receipts tax is a substituted tax and not a tax exemption; furthermore, that the provisions regarding it are to be construed liberally without leaning to the side of the taxing power.

Thus, in *County of San Bernardino v. State Board of Equalization*, 172 Cal. 76, 155 Pac. 458, the court said (pp. 78-79):

> "Appellant's counsel insists that the statute of 1911 is one providing for an exemption of property from taxation, and that therefore it should be strictly construed. *But the constitutional and statutory provisions for taxing the property of certain corporations by collecting a per centum of their gross earnings is not an exemption. It is merely a change in the method of taxation.* We need not here discuss this matter elaborately, because the origin and purpose of such taxes have been fully considered by this court in an opinion written by Mr. Justice Henshaw, in *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 423, (143 Pac. 700). *The words relieving public service and certain other corporations from local taxation must be given fair and reasonable interpretation 'without any definite leaning to the side of the taxing power.' (City and County of San Francisco v. Pacific Telephone and Telegraph Co.*, 166 Cal. 249, (135 Pac. 971); *Hartford Fire Insurance Co. v. Jordan*, 168 Cal. 270, 285, (142

Pac. 839).) *This court has followed the liberal interpretation given by the Supreme Court of the United States to the Federal Workmen's Compensation Act in classifying instrumentalities which are used in interstate commerce. (Southern Pacific Co. v. Pillsbury,* 170 Cal. 782, (151 Pac. 277).) *A similarly broad and reasonable policy should be followed in deciding questions relating to property which the state claims the exclusive right to tax.* The prime requisite for property properly classified as 'operative' is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision (a) of section 14 of article XIII of the constitution" (italics ours).

And again (p. 80):

"Even under statutes exempting railroad property from taxation (which according to the authorities must be strictly construed), buildings, repair-shops, and other instrumentalities reasonably incident to the proper and convenient carriage of passengers and commodities are included within the exemption (see 37 Cyc. 918, and cases cited). And there is stronger reason why similar adjuncts to the safe transmission of products requiring refrigeration should be removed from the local taxing power by the constitutional and statutory provisions which we have before us in this case, *because we are bound to give them liberal construction*" (italics ours).

In *San Francisco v. Pacific Telephone and Telegraph Co.*, 166 Cal. 244, 135 Pac. 971, the court said (p. 248):

"The appellant, relying upon the well-settled rule that exemptions from taxation are to be strictly construed (2 Lewis's Sutherland Statutory Constitution, sec. 539), argues that every doubt concerning the meaning of the provision in question must be resolved against the defendant. *But we think the amendment does not grant any exemption, within the meaning of this rule. As we have pointed out, it provides a*

specific mode of taxation, in substitution of certain other modes. In *Merrill Ry. & Lighting Co. v. City of Merrill*, 119 Wis. 249, (96 N. W. 686), the court after recognizing the doctrine of strict construction of exemptions, goes on to say: 'On the other hand, it is equally well settled that, where the statute in terms exempting property from general taxation is only a part of a general statutory scheme imposing a license or other impost in lieu of general taxation, the rule of strict construction has no application, but on the contrary, such a statute is to be construed liberally in favor of the person required to pay taxes in the substituted license form.' To the same effect are the cases of *Milwaukee etc. Ry. Co. v. Board of Supervisors*, 29 Wis. 116; *Milwaukee etc. Ry. Co. v. Milwaukee*, 34 Wis. 271; *Milwaukee E. R. & L. Co. v. Milwaukee*, 95 Wis. 42, (60 Am. St. Rep. 81, 3 L. R. A. 45, 69 N. W. 794), and *Duluth etc. Ry. Co. v. Douglas County*, 103 Wis. 75, 88, (79 N. W. 34). (See, also *Osborn v. New York & N. H. R. Co.*, 40 Conn. 491; *Neary v. Philadelphia etc. Ry. Co.*, 7 Houst. (Del.) 419, 9 Atl. 405, 414, 415; *Jersey City G. Co. v. Jersey City*, 46 N. J. L. 195, 196; Black on Interpretation of Laws, sec. 143). The foregoing quotation states the rule of construction in somewhat broader terms than we find it necessary to adopt here. Whether, in a case like the one before us, the construction should be liberal, *in favor* of the taxpayer, is questionable. But certainly the authorities, and good reasons as well, support the view that in such cases the meaning of the statutory or constitutional provision is to be ascertained by a fair consideration of all its terms, without any definite leaning to the side of the taxing power" (italics by the court).

It is to be noted that in the *San Bernardino* case (172 Cal. 76, 155 Pac. 458), the court decided the question left open in the *Pacific Telephone and Telegraph Company* case—i. e., whether the construction of the laws regarding gross receipts taxes should be "liberal"—and ex-

pressly decided that they *must be given a "liberal construction"* (172 Cal. 80).

The decisions of the State Supreme Court afford many instances in which the foregoing rules of construction have been applied. Thus, in *Hughes v. Los Angeles*, 168 Cal. 764, 145 Pac. 94, the court held that a city cannot levy an occupation tax on insurance agents. The constitution does not expressly forbid such a tax, but the court held it invalid because it would, in practical effect, fall on the insurance companies which pay gross premiums taxes in lieu of all other taxation.

In *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700, it was claimed that the constitution did not forbid a privilege or excise tax on public utilities, and that they should be required to pay license fees upon motor vehicles. The court held, however, that there could be no "privilege tax upon the *property* exclusively used in the operation of the business" (italics by the court; 168 Cal. 430). How much more forcibly does this language apply as against the direct local taxes in the case at bar!

In the *San Bernardino County* case (172 Cal. 76, 155 Pac. 458), the claim was made that a pre-cooling plant of the Pacific Fruit Express Company was not of the same nature as franchises, cars, rolling stock, horses and wagons and other things mentioned in the constitutional provision, so that under the rule of *ejusdem generis* it was subject to local assessment. This contention was overruled, the court emphasizing the broad equitable features of the constitution and statutes, the liberal construction it was bound to give them and the importance of *use* as determining the status of the property.

In *Southern Pacific Co. v. Levee District No. 1,* 172 Cal. 345, 156 Pac. 502, it was argued that the constitution did not prohibit assessments for benefits, and that railroad companies were subject to levee assessments. The court held that the companies were not subject to such assessments, except as specifically provided in the constitution, i. e. for the payment of principal or interest of bonded debts outstanding when the constitutional amendment was adopted (Art. XIII, Sec. 14, Subd. e).

Again, it has been held that telephone companies are not liable for city licenses *(San Francisco v. Pacific Telephone & Telegraph Co.,* 166 Cal. 244, 135 Pac. 971), and that insurance companies subject to state taxation on gross premiums are not liable for a state corporation license tax *(Hartford Ins. Co. v. Jordan,* 168 Cal. 270, 142 Pac. 839). These cases were decided on grounds including the broad and fair construction to be given the substituted tax and the importance of maintaining the separated system of taxation established by the constitutional amendments.

Sixth: The law cannot be construed to permit the double taxation, which would necessarily result if leased operative property of public utilities is subject to local taxation.

Through the varied stages of the litigation over the question here involved, it has always been assumed that petitioners' contention, if sustained, would result in double taxation of leased property used by public utilities.

Petitioners now claim that double taxation would not result, arguing that, because of the way in which the gross receipts tax rates were fixed the leased property is not "taxed through the gross receipts of respondents"

(Petitioners' Br. p. 105). The fact is, that the rates of the gross receipts tax were computed specifically to include a fair tax on leased property used by public utilities (supra pp. 23-24). The Circuit Court of Appeals was, therefore, manifestly correct in holding (Tr. p. 53):

> "that the gross receipts tax is a proper tax on the talking sets and that the levy threatened by the local authorities would result in the imposition of a double tax on the same property * * *".

This, we submit, the laws of the State cannot be construed to allow.

A. Section 3665a of the Political Code prohibits double taxation of property subject to the gross receipts tax, and Section 3607 of the Political Code prohibits double taxation as a matter of general law.

Section 3665a of the Political Code provides in part as follows:

> "Any company *claiming that the levy of the percentage* fixed by section three thousand six hundred sixty-four *a* of this code on the total gross receipts of such company *results in double taxation of the property of such company*, may make application to the state board of equalization for a hearing on such matter. Said board shall have power to take evidence and determine the facts with respect to such claim and in event said board finds the claim of such company to be true, said board may authorize such company to deduct from its reported gross receipts that amount of such receipts which, if included in such total gross receipts, *would cause such double taxation.*" (Italics ours).

Subdivision 4 of section 3665a (quoted supra p. 41), providing that income from nonoperative property (which property is taxed locally) shall be deducted from gross receipts reported for state taxation, was obviously intended to avoid duplicate taxation. Sections 3665c

and 3666, requiring the corporations to report their operative property and the local assessors to protest against the inclusion of any property claimed to be nonoperative, have a like purpose (*Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 657, 209 Pac. 553).

Section 3607 of the Political Code provides in part that

> "* * * nothing in this code shall be construed to require or permit double taxation."

B. As a matter of construction all presumptions are against double taxation. It will only be enforced under express statutory mandate, and will not be permitted in the face, as here, of express statutory prohibitions.

In *Lowry v. County of Los Angeles*, 38 Cal. App. 158, 175 Pac. 702, the court said (p. 164):

> "'In other words, it is a rule of construction, repeatedly recognized by the courts in taxation cases, that double taxation will not be presumed to have been intended, and will only be enforced under express mandate' (Judson on Taxation, sec. 425, p. 543). The decisions of our own state, the leading ones of which we have made reference to, by fair interpretation support this rule."

The foregoing is a thoroughly settled rule (37 Cyc. 755). The same principle has been applied by the state courts in gross receipts tax cases. So, in *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 Pac. 502, the court said (p. 352):

> "* * * we not only find the learned commissioners speaking in their reports indifferently of taxation by cities or taxation by counties or 'local taxation,' but we find in every word of their reports that their fundamental idea was that the state, and the state alone, should fully tax for its own purposes by this new method all of the properties of the corporations, which properties, *as a matter of justice to avoid*

double taxation * * * should be absolutely relieved from 'local taxation'" (italics ours).

In the same case the court discussed the provisions under which a public utility, assessed locally for the payment of outstanding bonds (Const. Art. XIII, Sec. 14, Subd. e), may deduct the amount of the local assessment from its gross receipts tax. In that case a levee district assessment had not been made at the time the plaintiff paid its gross receipts taxes to the state. In allowing recovery from the state of an amount equal to the assessment which the plaintiff was later required to pay, the court said (p. 355) that the constitutional amendment does not

> "*countenance for a moment the double taxation which would result if the state was paid the tax in full and the district in turn was paid its tax in full*" (italics ours).

In *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 Pac. 553, the court said with regard to the provisions of the Political Code (sections 3665c and 3666), requiring corporations to report their operative property to the Board of Equalization and requiring the local assessors to protest against the inclusion of any property claimed to be nonoperative (p. 657):

> "It would seem to be obvious that the purpose of these provisions in said act was that of preventing clashes between the state board of equalization and local assessors with respect to what property of such corporations was subject to their respective jurisdictions for the purposes of state or local taxation, *and thus avoiding double taxation*" (italics ours).

In *Pullman Co. v. Richardson*, 185 Cal. 484, 197 Pac. 346, the state court upheld the constitutionality of the

gross receipts tax as against corporations engaged in interstate commerce. The decision was based upon the theory already stated in the earlier case of *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700, that the gross receipts tax was a reasonably close and just equivalent for other taxes which were or might have been levied upon public utilities or their property. In the *Pullman* case the court said, quoting from the *Roberts* case (p. 489):

> "'Without pausing here to review the decisions of the Supreme Court bearing upon the question, but contenting ourselves with a subsequent reference to some of them, it may be said that the conclusions of the Supreme Court were that property used in the public service frequently acquired a value in the use, which value was something greater than the value of the property not engaged in such use; that by the systemization and unification of such properties in use they in the aggregate acquired a special value by virtue of this unity of use; that this special value was in the nature of property; *that a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied* (Citing cases).
>
> 'So much for the justness and reasonableness and legality of the new method * * * .'"

Petitioners concede that the gross receipts tax is designed to "bring about substantial equality between non-utility and public utility holdings" (Petitioners' Br. p. 157) in matters of taxation. This is manifestly impossible if leased property used by public utilities is to be subjected to double tax burdens.

Against the foregoing authorities petitioners cite *Bank of California v. Roberts*, 173 Cal. 398, 160 Pac. 225

(Petitioner's Br. pp. 139-140). This case is discussed in our argument on the constitutional question (infra p. 93-94). We will here only say that the opinion of the state court in the *Roberts* case justified duplicate taxation of shares of bank stock only on the theory that the state constitution expressly and specifically so required (173 Cal. 400, 401). The judgment of the state court was reversed by this court in *Bank of California v. Richardson*, 248 U. S. 476, and under the decision of this court, applying the federal statute (Rev. Stat. Sec. 5219) regarding the taxation of national banks, duplicate taxation was not permitted.

Seventh: Respondents' reply to certain arguments of petitioners with respect to the state law.

A. There is no rigid "scheme of taxation in California * * * that property is taxed to the owner thereof" (Answering Petitioners' Br. pp. 143-144).

Petitioners argued in the Circuit Court of Appeals, as they argue in this court, that local taxation of leased operative property should be permitted under the "general scheme of taxation in California, which they urge is based on the principle that the owners of property shall pay taxes" (Tr. p. 45). In holding this contention "against the real meaning of the amendment and the relevant statutes" (Tr. p. 45), the Circuit Court of Appeals assumed, and, we submit, correctly, that the alleged "general scheme of taxation in California" has too many qualifications to give any weight to petitioners' argument.

Section 8 of article XIII of the state constitution provides:

> "The legislature shall by law require each taxpayer in this state to make and deliver to the county assessor, annually, a statement, under oath, setting

forth specifically all the real and personal property owned by such taxpayer, *or in his possession, or under his control,* at twelve o'clock meridian on the first Monday of March" (italics ours).

Section 3629 of the California Political Code provides:

"The assessor must exact from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person, *or in his possession, or under his control,* at twelve o'clock M. on the first Monday in March. Such statement shall be in writing, showing separately:

1. All property belonging to, *claimed by, or in the possession or under the control or management of such person.*

2. All property belonging to, *claimed by, or in the possession or under the control or management* of any firm of which such person is a member.

3. All property belonging to, *claimed by, or in the possession or under the control or management* of any corporation of which such person is president, secretary, cashier, or managing agent" (italics ours).

Again, section 3635 provides:

"If the owner *or claimant* of any property, not listed by another person, is absent or unknown, the assessor must make an estimate of the value of such property" (italics ours).

Section 3636 provides:

"If the name of the absent owner is known to the assessor, or if it appears of record in the office of the county recorder where the property is situated, the property must be assessed to such name. If unknown to the assessor, and if it does not appear of record as aforesaid, the property must be assessed to unknown owners."

Section 3807 provides:

> "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable."

There are many instances in California in which property is not assessed to the owner, but to the person in possession or control of it. Thus money held in escrow by a title company as agent or trustee for interested buyers or sellers of land under search may be assessed to the title company (*Title Guaranty & Trust Co. v. County of Los Angeles*, 3 Cal. App. 619, 86 Pac. 844).

On the same principle collateral held by banks is often assessed to them. The seller of personal property subject to conditional sale is the owner, but the buyer is customarily and properly assessed for taxation (Political Code, Sec. 3628; see also *Houser & Haines Mfg. Co. v. Hargrove*, 129 Cal. 90, 95, 61 Pac. 660). Personal property may be assessed to an agent in possession or to a trustee (*People v. Home Insurance Co.*, 29 Cal. 533, 547-548). Property consigned for sale from any place out of the state "must be assessed in the county where the property is situated," and the assessment is made to the consignee (Political Code, Sec. 3638).

Land may be assessed to a mere possessor under claim of right (*Christy v. Fisher*, 58 Cal. 256, 259; *Ward v. Matthews*, 80 Cal. 343, 346, 22 Pac. 187), even though he has no title (*Reily v. Lancaster*, 39 Cal. 354, 357). The right of a purchaser of land from the state prior to patent or final payment is subject to taxation (*People v. Donnelly*, 58 Cal. 144, 146). So are possessory rights in

the public lands of the United States (*City of Pasadena v. County of Los Angeles*, 182 Cal. 171, 176, 187 Pac. 418; *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 23, 24, 179 Pac. 393; *Bakersfield etc. Oil Co. v. Kern County*, 144 Cal. 148, 77 Pac. 892; *People v. Shearer*, 30 Cal. 645, 657, 658).

As a practical matter it is not reasonably open to question, we submit, that taxes in California are primarily on property, not persons, and that the taxing authorities are primarily concerned with collecting them from property, the owner's liability being an incidental matter.

B. It does not follow from the fact that public utilities did not pay taxes on leased property prior to 1910 that the gross receipts tax is not in lieu of local taxes on operative leased property. Before 1910 no part of the gross receipts from the operative leased property was paid in taxes (Answering Petitioners' Br. pp. 144-148).

Prior to 1910 the assessment of property leased and used by public utilities was ordinarily made to the owner and not to the operating utility. Petitioners argue from this fact that the gross receipts tax was not intended to include taxes on such leased property. The framers of the constitutional amendments stated otherwise (supra pp. 30-31).

Furthermore, prior to 1910 no part of the income from leased property used by public utilities was paid in gross receipts taxes. Under the old system, leased property and owned property were taxed alike. Under the present system, if petitioners' contention were sound, owned operative property would be taxed only for state purposes, but leased operative property would be taxed upon its full value for both state and local purposes.

C. The Commission on Revenue and Taxation in its 1910 report did not in any way change the theory for computing rates explained in the 1906 report (Answering Petitioners' Br. pp. 144-158).

Petitioners make some suggestion that the theory on which the rates of the gross receipts tax were fixed, as announced in the 1906 report of the Commission on Revenue and Taxation (see supra pp. 23-34) was modified in the 1910 report. There is no basis for this suggestion. The Commission of 1910 was a continuation of the Commission of 1906, reduced from five to three members by the act of March 25, 1909 (Cal. Stats. 1909, p. 779). As stated in the 1910 report (p. 16),

> "The governor of this state, who is chairman of the commission, believed it advisable that, as the main work of the commission had been completed, and as it was only necessary to show the effect of the proposed amendment in its operation, the commission should be reduced in number, and therefore recommended that the act creating the commission be amended by providing for the appointment of only one commissioner [in addition to the governor and a secretary]. The legislature, therefore, amended that act by an act approved March 25, 1909."

The 1910 report was issued to bring the 1906 report up to date and to reaffirm the commission's sincere belief in the proposed constitutional amendments, which had been defeated in 1908 and were on the ballot of 1910 (when they carried). The amendments of 1910 differ from the proposed amendments of 1908 only in minor particulars.*

As to the theory of fixing the rates of gross receipts taxation, the 1910 report simply referred to the 1906 re-

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*These changes consisted of provisions for a state ad valorem tax, if the new system provided insufficient revenues; provisions making public service corporations liable to local taxation for preexisting bonded indebtedness; and provisions permitting the legislature to increase the rates of the gross receipts tax (*Report of Commission on Revenue and Taxation*, 1910, pp. 12, 13).

port. So, it said (*Report of Commission on Revenue and Taxation*, 1910, p. 19):

> "In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission."

And again (p. 37):

> "As to the adequacy of the rates of taxation proposed we may refer to the long and detailed discussion of all the points involved which was given in the 1906 report of this commission. Nothing has been brought out in the four years' discussion to lead us to feel that the rates were in any case too low."

In *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, the court said (186 Cal. 165):

> "The amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions."

Petitioners quote from the argument of State Senator J. B. Curtin (Petitioners' Br. p. 152) addressed to the voters in support of the amendments of 1910, underscoring the passages which say that the new system would yield increased revenues from public service corporations. This is exactly what it was contemplated that the amendments would do. One of the main considerations brought out by the Commission on Revenue and Taxation was that the gross receipts tax would furnish a practicable method of reaching franchise and going concern values, which the old system had not reached, thus making public utilities pay a fair tax on their intangible property (Report of

Commission on Revenue and Taxation, 1906, pp. 12-13). This, however, has nothing to do with the contention of petitioners that leased operative property was to be left subject to local taxation.

Neither is there any merit, we submit, in petitioners' suggestion (Petitioners' Br. pp. 157-158) that the argument to the voters explained the theory of gross receipts taxation differently from the Commission on Revenue and Taxation. State Senator Curtin, who prepared this argument, was a member of both the 1906 and 1910 commissions, and would hardly have contradicted his own reports. Furthermore, as the court said in *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351, 156 Pac. 502:

> "Of the purpose of the framers of this new taxation measure, and of the intent of the people in adopting it, there is fortunately not the slightest doubt. The state had appointed a learned commission on revenue and taxation, whose labors extended over many years. In 1906 they promulgated their first report. In 1910 they put forth their second report. *These reports were most widely distributed, at the state's expense, with the avowed purpose of educating its people to a knowledge of the reasons why the change in the method of taxation of public service corporations*, banks, insurance companies, etc., was deemed most desirable, and to an understanding of the benefits which would follow the adoption of the new method" (Italics ours).

Petitioners also quote a passage from the special report of the State Board of Equalization of 1912 (Petitioners' Br. p. 154). In this report, however, the board said that the gross receipts tax rates had been computed to yield a fair tax upon

> "A theoretical value for the property and franchises *in use*" (Petitioners' Br. p. 154).

Petitioners quote from page 18 of the 1910 report of the Commission on Revenue and Taxation (Petitioners' Br. p. 156):

> "The taxes reserved for the state are:
>
> (1) On the operative *property* of railroad companies, etc.
>
> * * * * * * * * *
>
> (4) On the *property* of telegraph and telephone companies, etc."

This quotation merely begs the question which is whether "operative property", on which all taxes are reserved for state purposes, does not include leased property.

The quotation, moreover, is only a half quotation. The Commission was not enumerating property subject to taxation, but was giving a schedule of rates. The complete quotation is as follows (*Report of Commission on Revenue and Taxation*, 1910, p. 18):

> "The taxes reserved for the state are:
>
> (1) On the operative property of railroad companies, including street railways, at the rate of four per cent of their gross receipts annually.
>
> * * * * * * * * *
>
> (4) On the property of telegraph and telephone companies at the rate of three and one-half per cent of their gross receipts annually."

Petitioners conclude their argument as to the proposed intention of the framers of the constitutional amendments by saying that the arguments addressed to the voters "were simply concerned in securing more taxes from the public utility corporations" (Petitioners' Br. p. 158). That one of the purposes of the new tax was to increase the tax contribution of public service corporations is true;

but it cannot be said, as petitioners' argument seems to imply, that any construction of the gross receipts tax law is permissible if it increases the taxes of public utilities, and that any claim on behalf of the public utility is necessarily wrong.

D. The word "their", as used in the state constitution, cannot be construed to limit the "in lieu" clause to owned property (Answering Petitioners' Br. pp. 158-164).

Petitioners argue that the gross receipts tax rests solely on owned property because the state constitution provides that telephone companies shall pay the gross receipts tax upon "*their* franchises * * * poles, wires * * * and other property or any part thereof used exclusively in the operation of their business in this state" (Cal. Const. Art. XIII, Sec. 14).

The word "their" may, of course, import ownership. With equal correctness and precision it may, however, import possession. It may be and often is used to describe leased property. A man can correctly say "my house", although he leases the house. Where the question is whether a railroad is liable under the Federal Employers' Liability Act "its" track includes leased track (*Campbell v. Canadian Northern R. Co.*, 124 Minn. 245, 144 N. W. 772, 773). Where the legislature empowers incorporators to build a dam on "their own land", it can be built on leased land (*Parker v. Cutler Milldam Co.*, 20 Me. 353, 356-357). When the Commission on Revenue and Taxation said (Report 1936, p. 77) that public utility industries are general and "belong to the people of the state as a whole, not to any particular community in which by accident *their* rails, wires, or offices may be", it obviously did not mean to limit its statement to *owned* rails, wires or offices.

Whether "their franchises * * * poles, wires * * * and other property or any part thereof used exclusively in the operation of their business in this state" includes leased property must, we submit, be determined from all the circumstances. As against the construction contended for by petitioners we oppose a construction which as a matter of etymology is just as permissible and which, we submit, every consideration touching the gross receipts tax imperatively demands. We have shown that the framers of the constitutional provisions said that the gross receipts tax rests on leased property used in operation; that the rates were fixed to include a fair tax on such leased property; that local taxation of leased operative property is inconsistent with the system of separated state and local taxation; that the statutes of the state provide that property *used* in the telephone business is not subject to local taxation; that the gross receipts tax laws are to be construed fairly and liberally to equalize tax burdens. Against these circumstances, we submit, no argument of any weight can be predicated upon the mere word "their". The Circuit Court of Appeals so held (Tr. p. 45).

We point out further that Section 3665b of the California Political Code is a codification of Section 8 of the Act of April 1, 1911 (Cal. Stats. 1911, pp. 530, 534), which was passed to put Section 14 of Article XIII of the state constitution into effect. The framers of the statute and of the constitutional amendment were the same. The statute, now set out in the code, describes property subject to state taxation as "*the* * * * property", not "*their* * * * property", used in operation.

It is, we think, unnecessary to discuss the cases cited by petitioners with respect to the word "their" (Petitioners' Br. pp. 161-164). Without exception these cases deal with tax exemptions of schools, religious institutions, etc. Such cases, we have already shown, have nothing to do with the gross receipts tax, which is not a tax exemption (supra pp. 43-46).

E. Contemporary construction of the constitutional provisions show that the gross receipts tax rests on all operative property, including leased property (Answering Petitioners' Br. pp. 165-169).

Petitioners claim that section 3668c of the Political Code, which makes the gross receipts tax "a lien upon all the property and franchises of every kind and nature belonging to the companies subject to taxation for state purposes", shows that the gross receipts tax rests solely on owned property. This argument, it seems to us, involves an entire misconception of the code section. That section was not intended to define property subject to state taxation. Such a definition appears in section 3665b, where it includes all property used in operation. Section 3668c is clearly intended not to limit this definition, but to extend the gross receipts tax lien to nonoperative property. In other words, a railroad might have investments or other holdings not used for railroad purposes, which, therefore, would not contribute to the gross receipts tax. It was the plain purpose of section 3668c to provide that such property should be subject to the lien of the gross receipts tax.

The best contemporary construction of the constitutional provisions, we submit, is in the report of the Commission on Revenue and Taxation, already quoted, and in

the Statute of 1911, which was drawn by the framers of the constitutional provisions (Cal. Stats. 1911, pp. 530,534).

F. The fact that leased property is not included in the service rate base of public utilities does not tend to show that the same is subject to local taxation. In ascertaining net revenue to fix service rates, rents are deducted as operating expenses. No deduction was made for rents in fixing the rates of the gross receipts tax (Answering Petitioners' Br. pp. 110-120).

Petitioners make much of the familiar fact that leased property is not included in the service rate base of public utilities. Any analogy, however, to be drawn from such rate making necessarily points to an exactly opposite conclusion from that for which petitioners contend.

In service rate making rent is deducted as an operating expense in ascertaining net revenue for valuation purposes. Service rates are computed to yield a fair return on property *owned* by the operating company, because leased property has had its return in the form of rent. But, in fixing the rates of the gross receipts tax no allowance was made for rents; on the contrary the rates were computed to yield a fair tax on values ascertained by capitalizing the earnings of all property in use, including leased property (supra, pp. 23-34).

G. There is no decision of the Supreme Court of California, inferentially or otherwise, supporting the contention of petitioners (Answering Petitioners' Br. pp. 170-180).

We have already replied to petitioners' claim that this case is controlled on points of state law by the opinion in the *Pacific Telephone* case (Petitioners' Br. pp 176-181). We have also referred to the case of *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700 (Petitioners' Br. pp. 170-171). That case, held that public

service corporations paying gross receipts taxes need not pay licenses on motor vehicles used in operation. The opinion in that case, furthermore contains the statement that the gross receipts tax is equivalent to a fair tax on all property *in use* (supra, p. 51).

In *Pacific Gas & Electric Co. v. Roberts*, 176 Cal. 183, 167 Pac. 845 (Petitioners' Br. p. 172), the court held that an electric company must pay its state tax upon receipts from all sales of electricity, without deducting amounts paid in the purchase of electricity from other companies. This decision is in strict accord with the theory of the gross receipts tax. Due allowance for expenses of this kind was made in the calculation of the rates of the tax. Under the principles by which these rates were fixed, the cost of such electricity would be deducted to obtain net earnings, from which the value of the property is calculated, on which in turn the rates of the gross receipts tax are computed (see *Report of Commission on Revenue and Taxation*, 1906, pp. 95-96). That value includes, as it should, the intangible value to the purchasing company of dealing in the purchased electricity. That value is property like any other property and should be justly taxed. It is because proper provision has been made for matters of this kind in fixing the rates of the tax, that the tax is ordinarily required to be paid on gross receipts without deduction (Political Code, Sec. 3665a; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 456).

In *Union Tank Line Co. v. Richardson*, 183 Cal. 409, 191 Pac. 697, the car company, which leased cars to an oil company, was held to be a car-loaning company "operating upon railroads in this state", and therefore liable for the gross receipts tax (Cal. Const., Sec. 14 of

Art. XIII). Petitioners say that this case represents the "converse of our situation" (Petitioners' Br. p. 175). This statement is obviously not accurate. The only question involved in the *Union Tank Line* case was the liability of the car company for a gross receipts tax. Had local authorities endeavored to tax the leased cars for their full value at the same time that the state was collecting a gross receipts tax from the rent of the cars, the case would have been parallel to the case at bar.

Eighth: There is no direct authority for the construction which petitioners put on the state law. Opposed to it are decisions from Wisconsin, Illinois and New Jersey.

The decision of the Circuit Court of Appeals is in line with every decision in which, so far as we have found, questions similar to that here presented have arisen. Most of these are cited by the Circuit Court of Appeals, but for convenience of reference we shall quote from the opinions.

In Wisconsin, for example, a statute imposed a gross receipts tax on street railways, and provided that all property "*owned* and actually and necessarily used by such * * * corporation in the operation of its business, shall be exempt from taxation and other license fees" (96 N. W. 686). In *Merrill Railway etc. Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686, the city assessed a tax on land leased to a street railway. The railway joined with the lessors in a suit to declare the tax void. Notwithstanding that the statute only relieved property "owned" by street railways from local taxation—obviously narrower language than that in the California constitution and statutes—the court set aside the tax. After pointing out that (as in California) the purpose of the

statute was to provide a broad and equitable scheme of state taxation, the court said (96 N. W. 687):

> "In the light of these rules for construction, then, we have to consider whether the Legislature can in reason be supposed to have used the word 'owned' in so general a sense as to be satisfied by a leasehold right for a term of five years. The purpose of this whole scheme was to measure the contribution of street railways to the public revenues by the earning capacity of their plants as entireties, recognizing that such plants include many elements which are peculiarly intangible and difficult of valuation by ordinary methods, such as the franchises to do business; the privileges to use highways and public grounds; the questionable title to the structures affixed to such realty and consequent difficulty of valuation specifically; the uncertainty, if not absence, of sale value of each element of the plant, except as used in connection with every other part, and in connection with the special franchises and privileges. It seems to us entirely probable that the Legislature intended in a general way to exempt from specific assessment and taxation those things which, in association with each other, help to produce the gross revenue on which the license fee is to be measured. *In this view it is difficult to see what leased property should not fall within the purpose of the exemption as readily as that owned absolutely, while actually used for the purposes of the enterprise. What difference would it make that his power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto of this particular property. Why should the legislators care whether the dynamos in the power house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded.* A further consideration arises out of the general public policy that the entire plant should not be subject to enforced disintegration or severance by process of law. This policy has been so emphatically declared, and the reasons for it so fully explained,

> that we need only refer to its existence. * * * Other considerations might be urged, but those suggested are sufficient to show that the use of the word 'owned' in a sense to be satisfied by a leasehold is not so unreasonable as to be unwarranted under the rule of liberal construction which must guide us" (italics ours).

After the decision in the *Merrill* case Wisconsin established an income tax, but exempted from it railroad companies which, as above noted, pay gross receipts taxes. In *City of Superior v. Allouez Bay Dock Co.*, 166 Wis. 76, 164 N. W. 362, the defendant leased to a railroad a dock used to transfer ore from cars to boats. Local officers imposed on the dock company an income tax measured by the rents. The court in holding that the dock was railroad property and that the tax was invalid, said (164 N. W. p. 364):

> "The argument is fallacious. When a railroad operates a terminal itself, or when a terminal is owned by a third person or corporation and operated solely as a terminal for the railroad, it is as truly a part of the railroad as its trains, and its business as truly a part of the railroad business as the operation of the trains. No reason is perceived why, for the purposes of taxation, such property should not be classified as railroad property and subjected to the same methods of taxation."

In Illinois, a statute required railroad companies to file with the State Board of Equalization sworn schedules of their tracks and gave the Board exclusive power to assess such tracks (100 N. E. 956-957). In *People ex rel. Abt, County Collector v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956, a railroad company reported part of its right of way which it held under lease from the defendant, and paid the tax assessed by the State Board (100 N. E.

957). The local assessor assessed the land to the defendant as owner of the reversion and obtained judgment against the defendant for local taxes. This, of course, resulted in taxing the land twice, just as, under petitioner's contention in the case at bar, the "talking sets" would be taxed twice. The Supreme Court of Illinois reversed the judgment for local taxes saying (100 N. E. 958):

> "The mere fact that the appellant owned the fee, and the railway company was in possession of this tract of land, under a lease or otherwise, did not authorize the local assessor to assess the right of way. Real estate used by a railway company for right of way is 'railroad track' for the purposes of assessment, and is assessable only by the State Board of Equalization even though the railroad company is a tenant by sufferance or has a lease, and the title to the land is owned by another corporation or individual."

People v. Illinois Northern R. Co., 248 Ill. 532, 94 N. E. 37, involved the same statute. There, too, a local assessor had assessed the lessor upon leased property covered by the lessee's return to the State Board of Equalization. The court said in reversing a judgment for local taxes (94 N. E. 40):

> "We think it is too clear for argument, in view of the statute and the adjudicated cases, that a railroad company's right of way must be assessed as a unit; that the only assessing body which can assess such right of way is the State Board of Equalization; that such board is given full power to assess real estate owned or operated by a railroad company as right of way; and that the jurisdiction of the State Board of Equalization is exclusive over the class of property designated by the statute as 'railroad track' for assessment purposes, whether held by a railroad company in fee or for years, or otherwise. In other

words, that the use to which the property is devoted, and not where the fee title rests, determines which of the assessing bodies—that is, the State Board of Equalization or local assessor—shall assess property in use by a railroad company for right of way purposes."

Likewise, in New Jersey, where the statute (Act of 1888, Secs. 1, 2 and 3; Comp. Stats. of 1910, Secs. 445, 446, 477) provides that "all property of any railroad or any canal company used for railroad or canal purposes" shall be assessed by state assessors, and that other property shall be assessed and taxed by local authorities, it has been held that land leased to a railroad company and used for railroad purposes is subject to assessment by the state and not by the city. In the case of *In re Pennsylvania R. Co.*, 49 Atl. 543, the Supreme Court of New Jersey decided that question in the following brief opinion:

> "The assessment is upon lands leased to the Pennsylvania Railroad for 20 years, which is used for railroad purposes. It is subject to assessment by the state board, and not by the city of Hoboken. (Citing cases.) The assessment by the city should be set aside."

See also

Wisconsin Electric Power Co. v. Town of Lake, 186 Wis. 199, 202 N. W. 195;

People ex rel. Wood, County Collector v. Terre Haute etc. R. Co., 256 Ill. 591, 100 N. E. 173;

State v. St. Paul Union Depot Co., 42 Minn. 142, 43 N. W. 840, 842;

City of Detroit v. Detroit Manufacturers' R. Co., 149 Mich. 530, 113 N. W. 365.

Of the foregoing cases the *Merrill* case (supra, p. 65) is so closely in point that petitioners do not try to distinguish it. The later Wisconsin cases, as well as the cases from Illinois and New Jersey, of course, arose under statutes differing from the California statute, but they are, we submit, clearly and closely analogous.

On the basis of the considerations so far advanced, the Circuit Court of Appeals held that local taxation of leased operative property of corporations subject to the gross receipts tax is invalid under the state law. This conclusion, we submit, was just and right.

II.

THE TAX IN DISPUTE IS VOID UNDER THE STATE LAW, BECAUSE RESPONDENTS INCLUDED THE LEASED "TALKING SETS" IN THE REPORTS OF THEIR OPERATIVE PROPERTY TO THE STATE BOARD OF EQUALIZATION AND THE COUNTY ASSESSOR FILED NO PROTEST AGAINST SUCH INCLUSION.

There is, we submit, a further and particular ground, besides the rules of general application already referred to, on which the tax in dispute is invalid under the state law. Respondents included the "talking sets" in the reports of their operative property which they were required to file with the State Board of Equalization (Bill of Complaint, Tr. p. 7; Testimony of A. J. Reed, p. 27). The defendant assessor did not protest against this inclusion of the "talking sets". This, under the law, if he claimed that the "talking sets" were nonoperative property, he should have done. His failure in this regard

alone renders his attempted assessment of the "talking sets" null and void.*

Section 3665c of the Political Code, after providing for the filing of reports with the State Board, requires each corporation to

> "furnish a duplicate of the report covering so much of said property as is located in any county, city and county, municipality, or district, to the assessor of the county, city and county, city or district, in which such property is located".

Section 3666 provides as follows:

> "NOTICE BY ASSESSOR OF PROPERTY REGARDED NONOPERATIVE. HEARING. 1. If any assessor finds in the report of the operative property in his county, city and county, municipality, or district, furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as nonoperative property, or partially operative and partially nonoperative, he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. He shall also mail a copy of the notice to the company whose property is involved. The said board shall investigate the nature of the property and its use, and, if an agreement between the said board, the assessor, and the company as to the proper classification of such property cannot be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing, at which the assessor and the company may be present or represented. At such hearing the board shall, from the evidence presented and from the best information it can obtain decide the matter in dispute, and determine whether such property is operative or nonoperative or in what

* This point was not considered in the *Pacific Telephone Company* mandamus case (supra p. 21).

proportion operative and in what proportion non-operative. The said board shall enter its decision in its minutes, and shall send a copy thereof to the county assessor and the company, and also to the proper officer of any municipality affected thereby. Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company, unless set aside by a court of competent jurisdiction, and each such assessor must note the decision on his assessment-roll, and must assess such property accordingly."

In *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 Pac. 553, an assessor attempted to assess locally property included by a public service corporation in its report to the State Board. There, as in the case at bar, the assessor had made no objection to the report. The trial court sustained a demurrer to the plaintiff's complaint to recover taxes paid under protest on the local assessment. The state Supreme Court, in reversing the judgment, held that the failure of the assessor to object to the report rendered the assessment void. The court said (189 Cal. 654-659):

"The respondent herein in support of the action of the trial court sustaining its demurrer to the plaintiff's complaint and of the judgment based thereon, makes three main contentions. First, that the said steam heating plant of the plaintiff is not 'operative property' within the intent and meaning of the foregoing provisions of the constitution providing for state taxation of property of gas and electric companies 'used exclusively in the operation of their business', and hence is the proper subject of local taxation. Second, that the terms of the statute above set forth providing that when the assessor finds in the report which the corporation has made to the state board of equalization and of which he has been furnished a copy, any piece of property which he regards as nonoperative property or as partially operative and partially nonoperative property, he

shall, within a specified period notify the said board and said corporation of his reasons for regarding the same as nonoperative property, * * * *which notification shall cause said board to institute an investigation into the nature and use of said property upon the hearing of which it shall be determined by said board whether such property is operative or nonoperative property, which determination shall be binding upon all parties,* is a merely permissive proceeding on the part of said assessor and that his failure to pursue the same is a mere irregularity which did not render the tax in question void. Third, that if such procedure is not merely permissive in so far as the assessor is concerned, the provision of the statute requiring it is unconstitutional and void.

As to the first of these contentions it may be said that * * * it is nevertheless a question which is not presented to this court for final determination in this case; and this by reason of the conclusion we have arrived at with respect to the second contention of the respondent herein as above set forth. * * * It would seem to be obvious that the purpose of these provisions in said act was that of preventing clashes between the state board of equalization and local assessors with respect to what property of such corporations was subject to their respective jurisdictions for the purposes of state or local taxation, and thus avoiding double taxation; and this is made even more apparent by the succeeding provisions of section 10 of said act which provided for an investigation by the board of equalization to be held for the purposes of determining whether the property in question is or is not operative property and which further provides that such determination when made 'shall be binding upon all parties, the state, the county, city and county, municipality or district, and the company, unless set aside by a court of competent jurisdiction; and each such assessor must note the decision on his assessment-roll and must assess such property accordingly'. In view of the foregoing express provisions of section 10 of the act of 1911 we are constrained to hold that the contention of the respondent is not well founded. * * * This court

has, in substance, held otherwise in the case of *Pacific Electric Railway Co. v. Rolkin*, 164 Cal. 156 (128 Pac. 20), in construing those very provisions of the act in question. In that case the failure of the city assessor of Los Angeles to file with the state board of equalization within the time prescribed in said act, his protest against the taxation of the property in question in that case as operative property of the Pacific Electric Railway Company, was held jurisdictional and a later filing of such protest by him ineffectual to prevent the said board from placing such property upon its roll as operative property; and that its action in so doing was as valid as if no such belated protest had been filed. *In harmony with these views we now hold that the failure of the assessor of the city of Oakland to file with the state board of equalization the required notice of his claim that the property in question was unoperative property of the plaintiff was jurisdictional in so far as his right to thereafter claim that said property was unoperative property, so to assess the same locally as such was concerned. His subsequent action in attempting to assess said property as unoperative property of such corporation was not, as the respondent contends, a mere irregularity, but on the contrary was an attempt to levy a local assessment upon property of the corporation, the status of which had, under the procedure provided in said act, been fixed for that fiscal year as operative property thereof, subject only to state taxation. The attempt of the assessor to thereafter subject the same to local taxation was therefore utterly void.* The respondent, however, contends that in so doing so as to render the act of 1911 unconstitutional as permitting the assessment of unoperative property by the state board of equalization and as relieving such property from local taxation. This contention, however, begs the question at issue by assuming that the property in question is unoperative property, an assumption which can not be made by the assessor or his principal, the respondent herein, after the valid assessment of such property as operative property by the state following the failure of said assessor to protest that same to the

state board of equalization by filing the notice and protest required by law" (italics ours).

Upon remission of the foregoing case to the trial court the defendant county answered, claiming that the company had only furnished the assessor with a "copy" of its report to the State Board and not a "duplicate", as required by section 3665*c* of the Political Code. A judgment of the trial court upholding this contention was also reversed by the State Supreme Court, which in its opinion reaffirmed the ruling in the previous case. It said (*Great Western Power Co. v. City of Oakland*, 196 Cal. 121, 139, 236 Pac. 307):

> "As he (i. e., the assessor) did not take the steps provided by law whereby he might have subjected the property in question to assessment for local purposes, if it were in fact not operative property of the appellant, he was without jurisdiction to make an assessment thereon (*Pacific Electric Ry. Co. v. Watkins*, 164 Cal. 156 (128 Pac. 20)). It follows, therefore, that the City was without jurisdiction to levy and collect any tax based upon such invalid assessment. This last conclusion we take now to be the law of the case, for it was in effect held on the former appeal in this case (*Great Western Power Co. v. City of Oakland*, *supra*, at pp. 657, 658) that the procedure prescribed by the code not having been followed, the attempt of the assessor to subject the property to local taxation was utterly void."

In the case of *Pacific Electric Ry. Co. v. Watkins*, 164 Cal. 156, 128 Pac. 20, which is cited in the *Great Western Power* cases, the court held that a protest of the local assessee is void if it is filed late. The court said (164 Cal. 158):

> "The city assessor of Los Angeles did not file any protest against the taxation of the property in question

> as operative property of the Pacific Electric Railway Company until more than thirty days after he had received the copy of the company's report which the law requires to be served upon him. The provision of the statute (Stats. 1911, p. 538) that such protest shall be filed within thirty days thereafter is jurisdictional. A protest filed later has no effect, and does not require the state board to revise or alter its action in placing such property on the roll as operative property, or to dispose of the protest in any way."

Petitioners argue that "no report of the 'talking sets' was made at all to the State Board of Equalization, except in so far as they might be included under the item * * * 'instruments'" (Petitioners' Br. p. 141). The fact is, as established by undisputed evidence (Tr. pp. 26-27), that the reports were made on forms furnished by the Board of Equalization and were made in such detail as was prescribed by the Board (Political Code, Sec. 3665; also Plaintiffs' Exhibits 1, 2, on file by stipulation as original exhibits (Tr. p. 34)). Respondents reported their instruments, of which the "talking sets" were integral parts. The "talking sets" were not specifically mentioned, any more than any other parts of the instruments, because the Board did not so require (Tr. pp. 26-27; see forms of reports furnished by the Board, Plaintiffs' Exhibits 1 and 2). A telephone instrument includes the receiver, transmitter and induction coil, just as much as a telephone pole includes the cross-arms, brace, insulators, clamp, anchors, guy wires and insulators upon it (Tr. p. 27).

Petitioners go outside the record to say that the copies of the reports furnished to the assessor were insufficient to require him to file a protest, because previously "these respondents and utilities generally had appeared in the

user plus ownership test laid down by petitioner assessor as to what constituted 'operative property' " (Petitioners' Br. pp. 142-143). The fact is that no claim was ever made by any assessor in any of the fifty-eight counties of California that the leased "talking sets" were subject to local taxation until petitioners made that claim in 1925.

III.

THE TAX IN DISPUTE IS INVALID UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

We have shown that the rates of the gross receipts tax were fixed to include a fair tax on all operative property of telephone companies including leased property, and that the local tax in suit on the full value of the leased "talking sets" would be a double tax burden (supra pp. 23-34). This, we contend, the state law should not be construed to permit. If, however, the state law were so construed, then, we contend, the collection of the local tax would violate the Fourteenth Amendment.

As will appear, the gist of our argument on this point is not the double tax burden, in and of itself, but the multiform discrimination which it would make against respondents and which, we contend, is based on no reasonable ground or classification.

Before discussing the separate matters of discrimination we call attention to certain authorities on the general principle involved; also to the authorities showing that in California no other leased property is subjected to two property taxes on its full value.

First: Preliminary considerations.

A. Unreasonable and arbitrary discrimination in matters of state taxation not based upon reasonable grounds of classification violates the Fourteenth Amendment.

In *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, the court said, quoting from the case of *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352 (p. 445):

> "'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"

In *Union Tank Line Co. v. Wright*, 249 U. S. 275, the court said (p. 282):

> "We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western Union Telegraph Co. v. Massachusetts*), and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both."

See also:

Road Improvement District No. 1 v. Missouri Pacific R. Co., 274 U. S. 188, 191;

Southern R. Co. v. Kentucky, 274 U. S. 76, 82-84;

Hanover Ins. Co. v. Harding, 272 U. S. 494, 508, 516;

Schlesinger v. Wisconsin, 270 U. S. 230, 239-241;

South Utah Mines and Smelters v. Beaver County, 262 U. S. 225, 231;

Bethlehem Motors Co. v. Flynt, 256 U. S. 421, 426;

Barbier v. Connolly, 113 U. S. 27, 31.

This rule, of course, does not bind the states to an iron-clad rule of equality in taxation (*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232). Neither does it, of itself, invalidate double taxation (*Shaffer v. Carter*, 252 U. S. 37, 58). It does, however, demand equal treatment for persons similarly situated, and forbids discrimination not based on reasonable grounds of classification. So, in *Atchison etc. R. Co. v. Vosburg*, 238 U. S. 56, the court said (p. 59):

> "The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

And in *Gulf etc. R. Co. v. Ellis*, 165 U. S. 150, the court said (p. 155):

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

And again (pp. 159-160):

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. • • • No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

B. The local tax is on the full value of the "talking sets". The gross receipts tax rates were fixed to include a fair tax on the full value of the same property. No other leased property in California is taxed for its full value to both lessor and lessee.

No property in California is taxed at its full value to both the lessor and lessee. The general practice in making assessments for *ad valorem* taxes is to assess the entire value of leased property against the owner of the reversion and to make no assessment against the lessee. All tangible property in the state is taxed either locally under the *ad valorem* plan or through the substituted property taxes paid under section 14 of article XIII of the state constitution.

In *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 Pac. 233, the court said (180 Cal. 22):

> "'It is true that the code makes no specific provision for separate assessments of leasehold and reversion to the lessee and the owner of the fee, respectively. The usual procedure in this state, as elsewhere, has been to assess the entire value of the land to the owner of the reversion. Such assessment covers the value of the leasehold as well as of the reversionary interest, the sum of the two being comprised in the value of a complete ownership of the land. (*Gramm Oil Co. v. Santa Barbara*, 155 Cal. 149 (20 L. R. A. (N. S.) 211, 99 Pac. 483).) The state thus receives the tax upon every interest in the land, and the requirement of the constitution and of Section 3627 of the Political Code is satisfied.'"

See also:

Fraser's etc. Pier v. Ocean Park Pier Co., 185 Cal. 464, 468, 197 Pac. 328, 198 Pac. 212;

Pacific Wharf & Storage Co. v. County of Los Angeles, 180 Cal. 31, 179 Pac. 398;

Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 Pac. 483.

In case where, for special reasons, assessments for *ad valorem* property taxes are made to lessees they are for the valueof the leasehold interest only.

In *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 Pac. 483, the court held it proper to assess an oil lease separately from the reversion. Oil leases, the court said, give the right to take the substance of the soil, and since the thus differ from ordinary leases there is sound reason for assessing the interest of the lessee and the owner separately. This, however, involved no double tax burden. The assessment against the lessee, as the trial court has specifically found, was for $14,950, the value of the leasehold only, and against the lessor for $66,450, the value ofthe reversion. The State Supreme Court said (155 Cal141-142):

> "We understand this finding to mean that there was no double assessment or double taxation upon the same property or interest therein, and we assume therefrom that the valuation of the entire estate and property in the land, as made by the assessor, including the plaintiff's rights and privileges, would exactly equal the aggregate amount of all the assessments levied."

After mentioning the general rule that there is ordinarily "but one assessment of the entire estate in the land, and that this assessment should include the value of

Second: The taxation of the leased "talking sets" locally for their full value, as well as for their full value through the gross receipts tax, arbitrarily discriminates against respondents in ways not justified by any reasonable classification.

A. The collection of the local tax would discriminate against respondents in favor of all other lessees in the state not paying a gross receipts tax.

The added burden of the local tax on the "talking sets", in addition to the substituted gross receipts tax already paid by respondents, would be a manifest and heavy discrimination against them in favor of all other lessees in the state not subject to the gross receipts tax.

On this point petitioners will no doubt argue, as they have argued before, that, inasmuch as the local tax is assessed against the American Telephone and Telegraph Company, respondents are not harmed. Such an argument ignores the substance of things.

If leased property of public utilities is fairly taxed like other property in the state, it is not important whether the lessor or the lessee pays the tax or whether their separate interests in the property are separately assessed (*Trimble v. Seattle*, 231 U. S. 683, 689; *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 22, 179 Pac. 393). Respondents resist the threatened collection of the local tax on the "talking sets", because they have already paid a substituted tax on the whole value of the sets. And where, as here, if petitioners' contention is sound, property leased by respondents for use in the telephone business must, by reason of the mere fact that respondents lease it, bear twice the tax burden of other leased property in the state, then respondents must ultimately bear the added burden, no matter to whom it is assessed.

If double taxation is a necessary incident to leasing property to a public service corporation paying a gross receipts tax, but not a necessary incident of leasing it to any one else, economic law inexorably requires that the public utility bear the added burden.*

The constitutionality of a state tax law depends upon its practical effect (*St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 348; *St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350). In the case last cited the court said (p. 362):

> "But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

The necessary and unescapable effect of the local tax, we submit, is to discriminate against respondents in favor of other lessees in the state who do not pay a gross receipts tax. The local tax cannot, therefore, be sustained, unless the discrimination rests upon a reasonable classification.

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*It should perhaps be added that respondents could not obtain any relief by recovering the part of their gross receipts taxes which represents taxes on the leased "talking sets". The state law requires the gross receipts tax to be paid on gross receipts without deductions "for any purpose whatsoever, except such refunds as arise from errors or overcharges" (Political Code, Sec. 3665a). Besides, the gross receipts taxes have already been paid, and since the petitioning assessor filed no protest against the inclusion of the "talking sets" in respondents' reports of property subject only to state taxation (*supra* pp. 7071), there was no opportunity for respondents to ask the Board of Equalization to make allowances to avoid double taxation (Political Code, Sec. 3665a). The discrimination can be removed only by invalidating the local tax, just as in overvaluation cases it can only be removed by reducing the discriminatorily high assessment, not by raising the assessments, which are too low (*Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445; *Chicago etc. R. Co. v. Kendall, Governor, et al.*, 266 U. S. 94, 98).

On this question petitioners say that our contention is that there is no proper ground for classification between property leased by a public utility and property owned by a public utility (Petitioners' Br. p. 37, et seq.). This involves a misconception of our position. The discrimination which would exist here, and which we contend is not permitted is between respondents as lessees and all other lessees in the state. In connection with petitioners' statement of our position we may here add, however, that we have found no case holding that property, merely because it is leased, can be classified differently from property of the same kind which is not leased, and can so be doubly taxed. Indeed, in most cases where leasehold and reversion have been separately assessed, the courts have been at pains to point out that the assessments on the two did not exceed the value of the property (supra, pp. 80-82). In *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, the Minnesota gross receipts tax law was involved. The plaintiff, a freight line company, suing to recover gross receipts taxes paid under protest, claimed that the taxes were unfair because the earnings of its cars were included in the receipts upon which the railroads paid gross receipts taxes, and were further subject to the gross receipts tax of the plaintiff. The court answered this contention, not by saying, as petitioners argue here, that such a double tax burden would be permissible, but by saying (p. 456):

> "In valuing the property on which the railroads are taxed the amount of the rental is deducted from their earnings. This plainly discloses a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns."

The real question of classification on the present subject is, we submit, not as between leased property and owned property, but as between lessees who are public utilities, subject to the gross receipts tax, and all other lessees in the state. We submit that classification on this basis for the purpose of imposing a double tax burden on the former class is not permissible.

Under the settled rule of this court, if the property of respondents were taxed on an *ad valorem* basis, they would be entitled to relief if state assessing authorities discriminated against them by overvaluing their leased property.

In *Raymond, Treasurer of Cook County v. Chicago Traction Co.*, 207 U. S. 20, the Illinois statute provided for *ad valorem* taxes on real and personal property. Capital stock was classed as personal property and was to be valued by the State Board of Equalization at its cash value under a fair method, to be decided by the Board, after deducting the value of the company's tangible property. At the time the general practice throughout the state was to assess property at approximately seventy-five per cent of its value and to impose taxes on one-fifth of this amount. The State Board ascertained the value of the plaintiff's stock in this way and assessed a tax for the year 1900, which was paid. Then a taxpayer's suit was brought in the state court and a writ of mandamus issued, requiring the Board to revalue the stock on the basis of its full cash value. This was done and resulted in a large increase in the plaintiff's tax. The increase was certified to local officers, the town tax collector and county treasurer, for collection. The court granted an injunction against a distraint to collect the tax, on the

ground that the proceedings violated the Fourteenth Amendment. In affirming the judgment this court said (pp. 35-36):

> "The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226. Following the above case the Federal courts throughout the country have frequently reviewed the action of taxing bodies when under the facts such action was in effect the action of the state, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question. See *Nashville &c. Ry. v. Taylor*, 86 Fed. Rep. 168; *Louisville Trust Co. v. Stone*, 107 Fed. Rep. 305. In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the court said: 'It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment.'"

The *Raymond* case was followed on the above point in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441,

445, and has been repeatedly approved in cases holding that a claim of unreasonable and systematic discrimination by state officers in assessing property for state taxes presents a *bona fide* claim under the Fourteenth Amendment which will support jurisdiction based on a federal question (*Bohler v. Callaway*, 267 U. S. 479; *Chicago etc. R. Co. v. Kendall, Governor, et al.*, 266 U. S. 94, 98; *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 508; *Louisville & Nashville R. Co. v. Greene*, 244 U. S. 522, 526).

The foregoing cases, we submit, are direct authority for the principle that the imposition of more burdensome property taxes on property of public utilities than are imposed on similar properties of other persons cannot be justified on the ground of classification.

In *Washington Water Power Co. v. Kootenai County*, 270 Fed. 369, cited with approval by this court in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445, the Circuit Court of Appeals for the Ninth Circuit said (270 Fed. 374):

> "Having seen that the assessment of property other than public utilities was intentionally made by local assessors upon a valuation of 50 per cent. of cash value, but the property of the appellant, a public utility, was deliberately assessed by the state authorities upon a basis of 75 per cent. of actual value, we are met with the question whether appellant is entitled to injunction against the excess over which the general property of the state was assessed. Whether or not the state board of equalization assessed other utilities upon the basis of 75 per cent. of actual value is not vital in the present instance, because if the state board, knowing of the intentional assessment of property generally on a 50 per cent. value, assessed the property of appellant on a 75 per cent. basis, *the fact that they may have assessed*

other public utilities upon a like basis cannot defeat the right of appellant to relief" (italics ours).

The situation in the case at bar, we submit, differs in no essential respect from the foregoing cases. The gross receipts tax is essentially a property tax (supra pp. 34-35). If in the administration of the ordinary property tax the state cannot discriminate by systematic overvaluation against property of public utilities, it should not be allowed to bring about a like discrimination by valuing leaseholds as fees through the collection of the gross receipts or substituted property tax, and at the same time permitting local assessment of the full value of the leased property.

We, of course, fully recognize the thoroughly settled right of the state to classify public utilities for taxation by different methods than other persons. Sound reason and authority also go to show that reasonable privilege and excise taxes can be imposed on public utilities which are not imposed on other persons. But from the standpoint of property taxes, and the gross receipts tax is a property tax—the property of public utilities is no different from other property. There is no more reason for discriminating between property of public utilities and other property in the matter of property taxes than there is, for example, in taxing foreign and domestic insurance companies at different rates on personal property (*Hanover Fire Ins. Co. v. Harding, Treasurer*, 272 U. S. 494); or in discriminating in the matter of license taxes against corporations not having three-fourths of their property invested in the state or in state bonds (*Bethlehem Motors Corporation v.*

Flynt, Sheriff, 256 U. S. 421); or in taxing foreign corporations on their property in a way imposing heavier burdens than on domestic corporations carrying on similar business (*Southern Railway Co. v. Greene*, 216 U. S. 400); or in classifying foreign corporations for license tax purposes on the mere number of their authorized non-par shares (*Air-way Corporation v. Day*, 266 U. S. 71, 85); or in classifying stockyard companies for purposes of regulation and rate-fixing merely on the basis of the volume of business done (*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79); or in requiring foreign corporation plaintiffs to submit to an adversary examination before answer which is not required of non-resident individual plaintiffs (*Kentucky Finance Corporation v. Paramount Auto Exchange*, 262 U. S. 544); or in requiring railroads to pay attorneys' fees or costs not imposed on adverse litigants (*Gulf etc. R. Co. v. Ellis*, 165 U. S. 150; *Atchison etc. R. Co. v. Vosburg*, 238 U. S. 56).

The cases cited by petitioners have, we submit, no bearing on the question before the court. *St. Joseph etc. R. Co. v. Steele*, 167 U. S. 659 (Petitioners' Br. p. 33), involved no constitutional question. The question there was whether a railroad bridge was subject to local taxation under the laws of Kansas. Federal jurisdiction was invoked on the ground that Congress had given the original builders of the bridge a franchise to charge tolls. Such a franchise manifestly would not exempt the bridge from taxation.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (Petitioners' Br. p. 45) involved an occupation tax as to which, of course, the states have wider latitude in selecting subjects for taxation than in property taxes (262 U. S. 179).

The Minnesota statute (quoted 262 U. S. 174-175) imposed a charge upon persons engaged in mining iron ore equal to six per cent. of the value of the ore extracted after deducting operating costs and royalties. Most of the opinion dealt with the question, answered in the negative, whether the tax was a burden on interstate commerce. The matters decided under the Fourteenth Amendment were:

1. To impose the tax on all *operators* of iron mines, including owners and lessees, involved a proper classification. To exclude contractors not producing on their own account and persons engaged in development work as distinguished from production, is reasonable (262 U. S. 179-180).

2. The claim that to permit a deduction for royalties discriminates against owners in favor of lessees need not be decided where it affirmatively appears that during the period in question no mines were operated by owners (262 U. S. 179-180).

In the case at bar there is no such situation. The discrimination here claimed is between respondents as lessees of the "talking sets" and all other lessees in the state not paying a gross receipts tax. The court will, we think, take judicial notice of the obvious fact that there are lessees in California other than corporations paying a gross receipts tax. (See *McLean* v. *Denver etc. R. Co.*, 203 U. S. 38, 51; *Petit* v. *Minnesota*, 177 U. S. 164, 168; *Minnesota* v. *Barber*, 136 U. S. 313, 321.) In the case last cited the court said (136 U. S. 321):

> "If a fact, alleged to exist, and upon which the rights of parties depend, is within common experi-

ence and knowledge, it is one of which the courts will take judicial notice."

The possible discrimination involved in the allowance by the Minnesota statute of deductions for royalties was removed by a later Minnesota statute which required owners of mines to pay a similar tax on royalties received from their lessees. This statute was sustained in *Lake Superior Mines v. Lord*, 271 U. S. 577 (Petitioners' Br. p. 48). The matter decided under the Fourteenth Amendment was that since ore lands are a distinct class of property the occupation tax might be levied upon operators of ore mines without being extended to the operators of quarries and forests.

It seems to us that these cases clearly do not support petitioners' position in the case at bar.

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, (Petitioners' Br. p. 43), the court held that a state might impose a gross receipts tax upon express companies operating under contract with other carriers, and at the same time tax railroad companies doing an express business over their own lines by a different method. The decision rests on the obvious differences between the business of a railroad company and an express company.

Bank of California v. Roberts, 173 Cal. 398, 160 Pac. 225 (Petitioners' Br. pp. 40, 42, 140), arose as follows: Under the separated system of taxation in California a tax for state purposes is levied upon bank stock in lieu of other taxes upon the shares of stock and the property of the bank, except local taxes on real estate. Though the tax is on the stock and against the shareholders, the banks are obliged to pay it. The Bank of California was a national bank, which owned shares of stock in the Mission State

Bank and in the Mills National Bank. It was taxed as a stockholder of both these institutions. In fixing the value of the Bank of California stock so that it could be taxed, the State Board of Equalization declined to deduct the value of its holdings in the other two banks. The bank paid under protest the taxes on its stock, and sued to recover the amount by which they would have been decreased had such deductions been made. The state court held that the state constitution forbade the making of the deductions claimed (173 Cal. pp. 400-401). It pointed out that if the ruling resulted in double taxation no other ruling was possible under the state constitution, and that double taxation, if based upon reasonable classification, is not contrary to the federal constitution (pp. 402-403). On appeal to this court the judgment was reversed. This court held (*Bank of California* v. *Richardson*, 248 U. S. 476; *Bank of California* v. *Roberts*, 248 U. S. 497), that (1) the Bank of California as a national bank was not taxable at all as a stockholder of the state bank, and (2) that in valuing the stock of the Bank of California for the purpose of making an assessment against its stockholders, the value of the shares in the Mills National Bank, on which the Bank of California, as a stockholder of the Mills bank had already paid a tax, must be deducted. This decision was based on section 5219 of the Revised Statutes, dealing with the taxation of national banks. The Fourteenth Amendment was not considered. Since, under the decision of this court, the state's claim of right to impose duplicate taxation was denied and no question of classification was considered, the *Roberts* case clearly does not in any way support petitioners' arguments on the constitutional questions in the case at bar.

B. The collection of the local tax would discriminate against respondents in favor of public utilities operating leased property, such as water companies and ferries, which, under the state law, pay no gross receipts tax.

The gross receipts tax is not paid by all public utilities in California (Cal. Const. Art. XIII, Sec. 14). For example, neither ferry companies (*Southern Pacific Company v. Richardson*, 181 Cal. 280, 184 Pac. 3) nor water companies (Cal. Const. Art. XIII, Sec. 14) are subject to it. The considerations showing that the collection of the local tax in suit would unreasonably discriminate against respondents in favor of lessees in general throughout the state, show even more clearly that the discrimination against respondents in favor of lessees who are public utilities not paying the gross receipts tax is unreasonable.

C. The collection of the local tax would discriminate against respondents in the taxation of their owned property in favor of all public utilities operating less or no leased property.

Petitioners argue that the gross receipts tax rests only on the *owned* property of public utilities paying the tax and from this erroneous assumption they further argue that no discrimination against respondents in the taxation of their leased property is possible.

Such an argument obviously changes the situation only in form of statement. It does not change the practical effect by which the constitutionality of the tax in suit must be measured (*St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350, 362). Moreover it necessarily leads to the conclusion that the collection of the local tax would seriously discriminate against respondents in the taxation of their *owned* property, in favor of all public utilities operating less or no leased property. This, we think, can be readily and clearly shown.

If the gross receipts tax rests only on property owned by public service companies subject to the gross receipts tax, the proportion between that tax and the value of the *owned* property thereby taxed will necessarily vary according to the amount of property leased. If a corporation derived large revenues from leased property its gross receipts tax would be wholly disproportionate to the value of its owned property; it might, indeed, equal or exceed the value of such property.

The discrimination can be shown by putting in tabular form a case of two public utilities whose business is in all respects the same, except that one company leases half its properties.

	Utility owning half and leasing half its properties	Utility owning all its properties
Value of all property operated, tangible and intangible	$1,000,000	$1,000,000
Value of property leased	500,000	None
Value of property owned	500,000	1,000,000
Gross receipts	350,000	350,000
Gross receipts tax (@ 5½% (in round figures)	20,000	20,000
Ratio of gross receipts tax to value of property on which paid	20,000 : 500,000 = 4%	20,000 : 1,000,000 = 2%

Thus, under petitioners' theory, the company leasing half the property operated pays, in the form of its gross receipts tax, a tax on the property which it owns at twice

the rate paid by the company operating no leased property.

Likewise, the gross receipts tax on a corporation operating a large amount of leased property could be, and in the case of many public service corporations no doubt would be, equivalent to a tax on the property which they own at a rate many times greater than the rate paid by any other property in the state.

Petitioners will no doubt criticise the foregoing tabulation as involving a "hypothetical case". It is, on the contrary, an illustrative representation of actual conditions. There can, we think, be no question that if, as petitioners contend, the gross receipts tax rests solely on owned property, the proportion between the burden of that tax and the value of the property taxed will vary with the amount of property leased; in other words, the more property a public utility leases and operates, the heavier will be the burden of the gross receipts tax on the property which it owns. Petitioners in asking the court to disregard the discrimination to which this condition would subject respondents as being merely theoretical, are in reality asking the court to assume, contrary to the fact, that there is no public utility in California which leases less property than respondents.

Third: To impose the double tax burdens for which petitioners contend, in the face of the statutory provisions expressly forbidding double taxation, would deny respondents the equal protection of the laws.

It is, we think, a recognized rule that double or unequal taxation imposed in the face of state laws forbidding it is a denial of the equal protection of the laws,

even though the double or unequal taxation might not be so unreasonable as in itself to violate the Fourteenth Amendment. In other words, if the state law confers rights in addition to the minimum required by the Fourteenth Amendment, the "equal protection of the laws" provision guarantees the additional rights which the state has given.

In *Johnson v. Wells Fargo & Co.*, (8th C. C. A.) 214 Fed. 180, affirmed 239 U. S. 234, the court had before it a provision of the constitution of South Dakota (quoted 239 U. S. 237-238), which required all taxes in the state to be uniform on all real and personal property according to its value in money, so that every person should pay a tax in proportion to the value of his, her or its property, and further, that the legislature should provide for the assessment of the property of corporations, as near as might be, by the same methods as provided for assessing taxes on individual property. The state levied a gross receipts tax on express companies. There is, of course, nothing in the Fourteenth Amendment to make such a tax inherently bad (*United States Express Co. v. Minnesota*, 223 U. S. 335). The Circuit Court of Appeals for the Eighth Circuit, in reversing the decree of the District Court dismissing the plaintiff's bill, held that, while the tax would have been in and of itself permissible under the Fourteenth Amendment, the tax was unlawful because the state constitution forbade unequal taxation. It was obviously on the theory that the tax law would deprive the plaintiff of the equal protection of the state constitutional provision that the court further said (214 Fed. 188):

"The record has convinced us that they (the taxes) are unjust, and excessive, that they are irregular and unlawful, but they are also unconstitutional and void, and their collection would constitute a taking of the property of the plaintiffs without due process of law, in violation of the national constitution, and the action of the board in making the assessments and levying the taxes was either a gross mistake equivalent to a fraud or an actual fraud, and mistake and fraud are immemorial grounds of equity jurisdiction."

In affirming the judgment this court said (239 U. S. 242):

"The stringent provisions of the constitution of South Dakota, then in force, required the adoption of a rule of valuation, as near as might be, of like character in assessing individual and corporate property in the state, and here, the record shows, the valuation of the property of the express companies was based principally upon their gross incomes, determined by the method already described. Such administration of the statute would be illegal, although the law upon its face be unobjectionable. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390."

In *Louisville & Nashville R. Co. v. Bosworth, et al.*, 230 Fed. 191, the ruling of which was reviewed by this court in *Greene, Auditor of Kentucky, et al., v. Louisville & Interurban R. Co.*, 244 U. S. 499, 503, the court said (230 Fed. 208):

"And in the case of Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, Mr. Justice Bradley said that the Fourteenth Amendment was not 'intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways.'

But, if the constitution of the state forbids unequal taxation, the legislative department in enacting tax laws has no right to make a discrimination, and, as stated, if in such a case it does discriminate, I see no

reason why its action would not be in violation of the Fourteenth Amendment as well as of the state constitution. Thereby the equal protection of the laws of the state would be denied, and by reason of the constitution of the state the right to discriminate which might otherwise exist has been taken away."

See also:

Railroad & Telephone Companies v. Board of Equalizers, 85 Fed. 302, 317.

The statutes of California expressly forbid *double taxation* (supra, pp. 48-49). Section 3607 of the Political Code provides in part,

"* * * nothing in this code shall be construed to require or permit double taxation."

The code section goes much further than to prohibit merely "unequal" taxation. In so many words it forbids double taxation.

Petitioners argue that the state constitution requires double taxation of the leased "talking sets", and that any statutes of the state forbidding double taxation are nullities so far as they are concerned (Petitioners' Br. p. 29). This argument, we submit, is unsound. It is not claimed that the state constitutional provisions regarding the gross receipts tax have repealed Section 3607 of the Political Code. The fact that the state might perhaps repeal it is not material; at the present time it is a valid law giving general protection through the state. If the effect of the state constitutional provisions is to deny to respondents the protection of the statute as petitioners claim, the conclusion seems to us unescapable that respondents are thereby denied the equal protection of the laws.

IV.

THE SUIT WAS WITHIN THE JURISDICTION OF THE DISTRICT COURT.

Petitioners' argument that the bill of complaint does not raise a federal question, and so is insufficient to establish jurisdiction, is directed to show that respondents have no substantially meritorious claim under the federal constitution. No criticism, as we understand petitioners' position, is made of the bill from the standpoint of pleading. It specifically alleges that the threatened acts of petitioners would infringe the rights of respondents under the Fourteenth Amendment (Tr. pp. 9-10). It alleges the facts on which the constitutional arguments of respondents are predicated. Of matters of state law (*Lamar v. Micou*, 114 U. S. 218, 223), and of matters of common knowledge (supra, p. 92), this court takes judicial notice and such matters need not be pleaded (*Hull v. Burr*, 234 U. S. 712, 720).

It is conceded that the constitutional claims of respondents, as set out in the bill of complaint, are advanced in good faith (Petitioners' Br. p. 11). The mere statement of them, involving as they do the double tax burden on the leased "talking sets", with its necessarily resulting discrimination against respondents, is in itself, we submit, sufficient to show that the constitutional claims are not frivolous or made simply as a pretense to give jurisdictional color to the complaint, but that, on the contrary, they are substantial, and, if necessary to be determined, present, to say the least, meritorious questions arising under the Fourteenth Amendment. Had they been lacking in all semblance of merit, it is safe to say that the Circuit Court of Appeals would not have entertained the

appeal, much less decided that the District Court had jurisdiction which it was bound to exercise (Tr. pp. 48-50, 53).

First: The substantial claim made in good faith that the collection of the tax in suit would violate respondents' rights under the Fourteenth Amendment raises a federal question and establishes federal jurisdiction even though the constitutional claim might not be decided, or might not be sustained on its merits.

In *Greene, Auditor of Kentucky et al. v. Louisville & Interurban R. Co.*, 244 U. S. 499, and companion cases, the plaintiffs were Kentucky public service corporations. They sued the members of the Kentucky Board of Valuation and Assessment and the Attorney General of the state and his assistants in the United States District Court for an injunction against the certification and enforcement of state franchise taxes (pp. 501-502). The plaintiffs alleged that the defendants had discriminated against them by assessing their franchises at a higher rate than that used in assessing similar property. There was no diversity of citizenship. Plaintiffs relied for jurisdiction on a claim under the Fourteenth Amendment; they also claimed that the threatened action of the defendants violated the state constitution. The defendants contended that the court had no jurisdiction. In overruling this contention this court said (p. 508):

> "The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessment under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the State, and if carried out would violate the equal protection provision of the Fourteenth Amendment, *presents, without question, a real and substantial controversy*

under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties" (italics ours).

In *Raymond, Treasurer of Cook County, Illinois v. Chicago Traction Co.*, 207 U. S. 20 (supra, pp. 87-88), where jurisdiction of the federal court was similarly invoked, this court said (p. 35):

> "The claim that the action of the State Board of Equalization in making the assessment under consideration was the action of the State, and if carried out would violate the provisions of the Fourteenth Amendment to the Constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, *constitutes a Federal question beyond all controversy*" (italics ours).

To the same effect are the following cases, in each of which jurisdiction rested on the contention that the collection of a particular state or local tax would be in violation of the Fourteenth Amendment:

Chicago etc. R. Co. v. Kendall, Governor et al., 266 U. S. 94, 97-98;

Wilson, County Collector of Taxes v. Illinois Southern R. Co., 263 U. S. 574, 575-576;

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445;

Louisville & Nashville R. Co. v. Greene, Auditor et al., 244 U. S. 522, 528;

Waggoner v. Wichita County et al., 298 Fed. 813, 820 (Aff. 5th C. C. A., 3 F. (2d) 962; Aff. 273 U. S. 113);

Bank of Arizona v. Howe, Commissioner et al., 293 Fed. 600, 606-607;

Gammill Lumber Co. v. Supervisors, etc., 274 Fed. 630, 631, 632;

Louisville etc. R. Co. v. Bosworth, Auditor et al., 230 Fed. 191 (same case, 209 Fed. 380, 381, 450-451);

Mayor etc. v. Central R. Co. (3rd C. C. A.), 212 Fed. 76, 82-83 (Aff. 199 Fed. 237, 242);

Louisville Trust Co. v. Stone, Auditor et al. (6th C. C. A.), 107 Fed. 305, 309.

Other cases holding that a *bona fide* claim, that threatened action of state or local officers would violate constitutional rights, raises a federal question, are:

Railroad Commission of Minnesota v. Duluth St. R. Co., 273 U. S. 625, 628;

Terrace v. Thompson, Attorney General et al., 263 U. S. 197, 214;

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462;

Phoenix Railway v. Geary, Corporation Commissioner et al., 239 U. S. 277, 281;

Home Telephone Co. v. City of Los Angeles, 227 U. S. 278;

Siler et al., Commissioners v. Louisville etc. R. Co., 213 U. S. 175, 190-191;

Ex parte Young, 209 U. S. 123, 143-145.

It is, under the settled rule of this court, not necessary that the constitutional claim be sustained on its merits in order to sustain the jurisdiction. In *Moore v. New York Cotton Exchange*, 270 U. S. 593, this court said (pp. 608-609):

"Whether the objection that a bill of complaint does not state a case within the terms of a federal

statute challenges the jurisdiction or goes only to the merits, is not always easy to determine. The question has been recently reviewed at some length by this court in *Binderup v. Pathe Exchange*, 263 U. S. 291, 305, and the distinction pointed out as follows:

'Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. (Citing cases.) In that event the claim of federal right under the statute, is a mere pretence and, in effect, is no claim at all.'

Here, facts are set forth in a serious attempt to justify the claim that the federal statute has been violated; and, while we hold them to be insufficient to sustain the claim, we are not prepared to say that they are so obviously insufficient as to cause it to be without color of merit and, in effect, no claim at all. We think there is enough in the bill to call for the exercise of the jurisdiction of a federal court to decide, upon the merits, the issue of the legal sufficiency of the allegations to make out the claim of federal right."

See also:

Harrison v. Chamberlin, 271 U. S. 191, 195 (Claim "is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to

be plainly without color of merit, and a mere pretense");

Binderup v. Pathe Exchange, 263 U. S. 291, 305-306 (Quoted in *Moore v. New York Cotton Exchange*, supra);

Hart v. Keith Exchange, 262 U. S. 271, 274 ("It is not necessary to draw the line between the foregoing and other cases brought * * * to assert a claim under the Constitution that have been ordered to be dismissed below because 'absolutely devoid of merit,' * * * beyond confining the latter to those that are very plain. * * * The * * * case should be decided upon the merits unless the want of jurisdiction is entirely clear");

The Fair v. Kohler Die Co., 228 U. S. 22, 25 ("* * * if the claim of right were frivolous, the case might be dismissed").

The logic of the general rule that a substantial claim of right asserted under the laws or constitution of the United States is enough to establish jurisdiction is, we think, well illustrated by petitioners' argument on this subject. Their "fundamental premise", they say, is

> "that a bill of complaint which alleges the invalidity of a tax * * *, which tax would be valid under the fourteenth amendment if authorized by the fundamental law of the state, * * * fails to state a federal question" (Petitioners' Br. p. 54).

Such, however, is not the complaint in the case at bar. On the contrary it distinctly avers that the tax in dispute, if authorized by the law of the state, would be contrary to the rights of the respondents under the Fourteenth Amendment. Petitioners are, in reality, arguing here, just as they argued below, that the federal court should defeat its

jurisdiction by assuming that respondents' constitutional claim is without merit (*Cuyahoga Power Co. v. City of Akron*, 240 U. S. 462 and cases cited supra, pp. 105-106).

In *Corrigan v. Buckley*, 271 U. S. 323, 329, and in the other cases cited by petitioners in this connection (Br. pp. 21-23) the claim of federal right was held to have been frivolous, and we may add, in nearly all of them, because the claim asserted had been previously denied by repeated decisions (*Zucht v. King*, 260 U. S. 174; *Brolan v. United States*, 263 U. S. 216; *Hendricks v. United States*, 223 U. S. 178; *Equitable Life Assurance Society v. Brown*, 187 U. S. 308; *McGilvra v. Ross*, 215 U. S. 70).

Second: The collection of the tax in dispute would be action of the state within the meaning of the Fourteenth Amendment, and within the jurisdiction of this court, even though respondents claim that the tax is invalid under the state law. On this point the case of Barney v. New York, 193 U. S. 430, relied on by petitioners, has been overruled.

Petitioners, in arguing that their threatened action in collecting the tax is not action of the state (Petitioners' Br. p. 53) confuse, we think, two distinct things, one a suit against a state within the meaning of the Eleventh Amendment and the other, state action within the meaning of the Fourteenth Amendment. It is settled that a suit to enjoin wrongful action of state officers is not a suit against the state prohibited by the Eleventh Amendment (*Ex parte Young*, 209 U. S. 123, 150, 155; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Truax v. Raich*, 239 U. S. 33, 37; *Greene, Auditor of Kentucky et al. v. Louisville & Interurban R. Co.*, 244 U. S. 499, 506-507; *Public Service Co. v. Corboy*, 250 U. S. 153, 159).

It is equally well settled that action by a state officer, under the color of state authority, is state action within the meaning of the Fourteenth Amendment, against which the federal courts have jurisdiction to protect. So, in *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, the court said (p. 507):

> "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: 'Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual'."

In the *Raymond* case the court said (207 U. S. 35-36):

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State. *Chicago, Bur-*

lington & Quincy R. R. v. Chicago, 166 U. S. 226. Following the above case the Federal courts throughout the country have frequently reviewed the action of taxing bodies when under the facts such action was in effect the action of the State, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question."

To the same effect are:

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441;

Standard Scale Co. v. Farrell, 249 U. S 571, 577;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350;

Louisville & Nashville R. Co. v. Greene, Auditor et al., 244 U. S. 522, 528;

Illinois Central R. Co. v. Greene, Auditor et al., 244 U. S. 555, 559-560;

Home Telephone Co. v. Los Angeles, 227 U. S. 278, 287;

Ex parte Young, 209 U. S. 123, 155-160.

The petitioning officers, however, say that they are county officers, not state officers, and, therefore, claim that they are not acting for the state (Petitioners' Br. pp. 63-64). But they hold office by virtue of the state law (see California Political Code, Sec. 4230 et. seq.). Their duties are defined by the Political Code and in the levy and assessment and collection of taxes they proceed under the general law. A county is a body politic and corporate (Political Code, section 4000); it is "a governmental agency or political subdivision of the state" (*County of San Mateo v. Coburn*, 130 Cal. 631, 636, 63 Pac. 80; *Dillwood v Riecks*, 42 Cal. App. 602, 607, 184 Pac. 35).

This court has repeatedly held that under such circumstances local officers are state officers, whose action is state action under the Fourteenth Amendment. So, for example, in the *Raymond* case (207 U. S. 20) the defendants, who were enjoined from collecting taxes, were the town tax collector of North Chicago and the county treasurer of Cook County. In *Wilson v. Illinois Southern R. Co.*, 263 U. S. 574, the defendants, against whom an injunction was granted, were tax collectors of five Illinois counties. In *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, the defendants included taxing authorities of Dakota County. In *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278; *Cuyahoga Power Co. v. City of Akron*, 240 U. S. 462, and *Old Colony Trust Co. v. Seattle*, 271 U. S. 426, it was held that injunctions might be granted under the Fourteenth Amendment against municipal officers.

The petitioners further argue that since respondents contend that the tax in suit is invalid under the state law, they cannot claim that the collection of it would be an act of the state. On this point they rely on *Barney v. New York*, 193 U. S. 430. Although the *Barney* case was later overruled by this court in *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278, we will refer to it because of the emphasis which petitioners place upon it.

The *Barney* case involved a suit to enjoin the City of New York and its Board of Rapid Transit Commissioners from proceeding to construct a railroad. The plaintiff alleged that the road was being constructed contrary to the law of New York, in that a change in plans had been made without the approval required by the statute; further, that the continued construction would deprive the

plaintiff, an abutting owner, of his property without due process of law, in violation of the Fourteenth Amendment. This court affirmed a decree dismissing the bill for want of jurisdiction, saying (p. 437):

> "Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

If this decision had not been overruled, it would require a plaintiff, who contended that action of administrative officers violated both the state law and the federal constitution, to exhaust his remedies in the courts of the state before asking federal relief, because, unless and until the highest authority in the state should hold the action in question valid under the state law, there would, according to the *Barney* case, be no *state* action of which the plaintiff could complain. In other words, a plaintiff who claimed a violation of both his state and federal rights, would have an initial remedy in the state court only.

In the *Raymond* case, the facts of which have been stated (supra, pp. 87-88), the plaintiff's bill specifically alleged that the taxes sought to be enjoined were contrary to the uniformity provisions of the Illinois constitution and statutes, but the court retained jurisdiction and granted relief regardless of the *Barney* case, which, it held, applied only where the state law *expressly* prohibited the acts complained of (207 U. S. 37).

The doctrine of the *Barney* case was directly repudiated in the case of *Home Telephone Co. v. Los Angeles*, 227 U. S. 278. In that case the plaintiff sued to enjoin

the enforcement of a rate fixing ordinance on the ground that it was contrary to the Fourteenth Amendment. Jurisdiction depended on the federal question thus raised. The defendant city and its officers claimed that the ordinance, if contrary to the Fourteenth Amendment, was *ipso facto* contrary to similar provisions of the state constitution; that there was, therefore, no *authorized* state action shown by the plaintiff's bill to raise a federal question. The court held that this position was untenable. The whole opinion bears so directly upon the contentions made by petitioners that it is almost impossible to single out the most apt passages. We, therefore, respectfully refer the court to the opinion, quoting only the comments of this court expresly dealing with the *Barney* case.

The court said (227 U. S. 294):

> "Much reliance is placed upon the decisions in *Barney v. New York*, 193 U. S. 430, and *Memphis v. Telephone Co.*, 218 U. S. 624. The latter we at once put out of view with the statement that on its face the question involved was one of pleading and in no sense of substantive Federal power. As to the other—the *Barney* case—it might suffice to say, as we have already pointed out, it was considered in the *Raymond* case and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the *Barney* case, it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the *Barney* case and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly at

least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney* case in so far as it might be found to conflict with the rule here applied."

With reference to the *Barney* case, the Circuit Court of Appeals said (Tr. pp. 49-50):

"Respondents cite Barney v. New York, etc., 193 U. S. 430, as supporting the argument that all possible remedies under the state law must be exhausted before plaintiffs are entitled to relief in the federal courts. But the force of the Barney case has been greatly weakened by the discussion in Home Telephone Company v. County of Los Angeles, 227 U. S. 278, where there was no diversity of citizenship alleged. The Telephone Company sued to enjoin the enforcement of a rate fixing ordinance on the ground that the ordinance was contrary to the Fourteenth Amendment. Defendant answered that the ordinance, if contrary to the Fourteenth Amendment, was contrary to similar provisions of the state Constitution, and that the Telephone Company must proceed under the state law. The Court, speaking through Chief Justice White, said: 'That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.' The Barney case, supra, was expressly held to have been so distinguished or qualified by the Raymond case, supra, as not to be even persuasive in the argument that the federal court will not interfere merely because of a contention that it is the duty of the plaintiff to exhaust all possible remedies under the state law before he is entitled to relief in the federal court. Other cases might be cited, but those

selected are authority for holding that a federal question is presented."

The Circuit Court of Appeals, we submit, was right in holding that the *Barney* case is no longer an authority on the point to which petitioners cite it. The rule is that, in determining the question of federal jurisdiction to prevent an alleged unconstitutional act by a state officer, "inquiry concerning whether the State has authorized the wrong is irrelevant" (227 U. S. 287). This rule was necessarily implied in the *Raymond* case (207 U. S. 20) and in *Siler, Commissioner, et al. v. Louisville & Nashville R. Co.*, 213 U. S. 175, was definitely stated in the *Home Telephone* case, and has since been repeatedly followed. See:

Fidelity & Deposit Co. v. Tafoya, Corporation Commissioner, et al., 270 U. S. 426, 434;

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97-98;

Wilson v. Illinois Southern R. Co., 263 U. S. 574;

Greene, Auditor, v. Louisville Interurban R. Co., 244 U. S. 499;

Louisville & Nashville R. Co. v. Greene, Auditor, et al., 244 U. S. 522;

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462, 464;

Union Light etc. Co. v. Railroad Commission of Kentucky, 17 F. (2d) 143, 146;

City of Dayton v. City R. Co. (6th C. C. A.), 16 F. (2d) 401, 404-405;

Portland R. etc. Co. v. City of Portland, 210 Fed. 667, 669;

Louisville & N. R. Co. v. Bosworth, Auditor, et al., 209 Fed. 380, 450.

Third: Jurisdiction established by a federal question extends to the whole case, including questions of state law.

The foregoing considerations show, we submit, that this is a proper case for federal jurisdiction. The jurisdiction so established extends to the whole case and the Circuit Court of Appeals was right in reviewing and determining the questions presented with respect to the state constitutional and statutory provisions involved. On this point we quote the following brief extract from *Greene, Auditor et al. v. Louisville & Interurban R. Co.*, 244 U. S. 499. In that case, after pointing out that the District Court had jurisdiction because a federal question was raised by the bill, the court said (p. 508):

> "This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Ohio Tax Cases*, 232 U. S. 576, 586."

To the same effect are:

Bohler, Tax Collector et al. v. Callaway, 267 U. S. 479, 489;

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97, 98;

Louisiana Public Service Commission v. Morgan's etc. Steamship Co., 264 U. S. 393, 395;

Davis, et al., v. Wallace, et al., 257 U. S. 478, 482;

Camp v. Boyd, 229 U. S. 530, 551-552;

Siler, et al., Commissioners, v. Louisville etc. R. Co., 213 U. S. 175, 1901-19;

Ex parte Young, 209 U. S. 123.

Fourth: The District Court could not, in its discretion, refuse jurisdiction.

It is evident from the opinion of the trial court (Tr. pp. 31-32) that it believed that it had jurisdiction. This jurisdiction, for reasons of policy, it decided not to exercise. The court said (Tr. pp. 31, 32):

> "I have reached the conclusion that I cannot entertain the suit. This conclusion is arrived at somewhat reluctantly, because to me the merits seem so plain.
>
> * * * * * * * *
>
> It seems to me of the utmost importance to all concerned, including (fol. 51) the American people, that the proper correlation of the Courts of State and Nation is of greater importance than any direct issue here involved. I feel that this Court might take jurisdiction, but I am not persuaded that it would be error not to do so. For that reason, I believe the matter should be left to the Courts of the State of California."

Petitioners, in effect, take the same position as the District Judge in their repeated arguments that the decision of matters of state law in this case should be left to the state courts. The Circuit Court of Appeals held, however, and, we submit, correctly, that this position is untenable. When jurisdiction attaches it extends to all questions in the case, including questions of state law (supra, p. 115). Acceptance of jurisdiction is not a matter of discretion with the federal courts. If jurisdiction is properly invoked, it must be exercised. So in *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, the court said (p. 404):

> "It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that

> it must take jurisdiction, if it should. • • • We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

The fact that questions of state or local importance are involved makes no difference. In *Wilcox, et al., Public Service Commissioners of New York, v. Consolidated Gas Co.*, 212 U. S. 19, a suit to enjoin the enforcement of rate fixing statutes and orders, where jurisdiction, as in this case, rested on a federal question, this court said (pp. 39-40):

> "At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, *as if it were a question of discretion or comity, whether or not the court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohens v. Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal Court. *The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied*" (italics ours).

To the same effect are:

Railroad Commission of Minnesota v. Duluth St. R. Co., 273 U. S. 625, 628;

Kline, et al., as the Board of Improvement, v. Burke Construction Co., 260 U. S. 226, 234;

McClellan v. Carland, 217 U. S. 268, 281;

Ex parte Young, 209 U. S. 123, 142-143;

Chicot County v. Sherwood, 148 U. S. 529, 534;

Hyde v. Stone, 20 How. (61 U. S.) 170, 175.

V.

RESPONDENTS HAVE NO ADEQUATE REMEDY AT LAW AND ARE ENTITLED TO AN INJUNCTION.

The Circuit Court of Appeals stated three distinct grounds why respondents have no adequate remedy at law for the threatened action of petitioners and are, therefore, entitled to sue in equity (Tr. pp. 50-53); first, that any possible right of respondents to maintain an action under the state law to recover the tax after payment is extremely doubtful and therefore inadequate; second, that, even if they had such right of action, they could not recover any interest prior to judgment, and third, that even if they had such right of action there would necessarily be a multiplicity of suits because the action would have to be brought not only against the county, but also against the sixteen municipalities, to which the county would distribute parts of the tax.

First: Any possible right of respondents under the state law to pay the tax in suit and, as lessees of the "talking sets", to maintain an action at law to recover it is too doubtful to be adequate.

Petitioners claim that respondents have an adequate remedy at law by paying the tax and bringing an action to recover it under either section 3819 or section 3804 of the Political Code of California. We submit that respondents, being lessees and not owners of the "taking sets", have no remedy under either section.

Section 3819 (omitting the last paragraph, which deals with taxes, which may have been paid into the state treasury) reads as follows:

> "PAYMENT OF TAXES UNDER PROTEST. ACTION WITHIN SIX MONTHS. AMOUNT DUE COUNTY FROM STATE. At any time after the assessment-book has been received by the tax-collector, and the taxes have become payable, *the owner* of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax-collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment.
>
> ACTION TO RECOVER TAX. *And such owner* may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest; provided, however, that no recovery shall be had in any such action unless such action be brought by such *owner* or his guardian, or in case of his or her death, by his or her executor or administrator; and provided, further, that no recovery shall be had in such action if the same be brought by an assignee of such owner, or by anyone other than the persons last hereinabove designated. And if it shall be adjudged that the as-

sessment, or the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against such county therefor; provided, that no assessment shall be declared void on account of deductions being made for mortgages where part payments have been made and not released upon the record."

This section, which permits no one but the "owner" of assessed property to recover taxes thereon, affords no remedy to respondents, who are not owners but lessees.

In *Warren v. San Francisco*, 150 Cal. 167, 88 Pac. 712, the State Supreme Court, in holding that an abutting lot owner, who had paid an illegal tax on a portion of the street to prevent a sale of that part of the street, to the manifest injury to his own property, had no rights under section 3819, said (150 Cal. 170):

"'Section 3819 of the Political Code has no application. That section provides that the "owner" of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest; and that when so paid under protest the payment shall not be regarded as voluntary. The plaintiff herein was not the "owner" of the land assessed.'"

Section 3804, we submit, is likewise inapplicable. It provides:

"REFUND OF ERRONEOUSLY COLLECTED TAXES, ETC. IN SCHOOL DISTRICT. VERIFIED CLAIM. ACTION FOR ENFORCEMENT OF CLAIM. Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor as to the excess in such cases, or any taxes heretofore or hereafter paid upon an erroneous

assessment of improvements on real estate not in fact in existence, when said taxes became a lien, may, by order of the board of supervisors, be refunded by the county treasurer. Whenever any payment shall have been made to the state treasurer by the county treasurer as provided by section three thousand eight hundred sixty-five and section three thousand eight hundred sixty-six of this code, and it shall afterward appear to the satisfaction of the board of supervisors that a portion of the money so paid should be refunded as herein provided, said board of supervisors may refund such portion of the said taxes, penalties and costs so paid to the state treasurer, to the person paying the same or to his guardian, or in case of his death, to his executor or administrator, out of the general fund, and upon the rendering of the report required by section three thousand eight hundred sixty-eight of this code the auditor shall certify to the controller in such form as the controller may prescribe, all amounts so refunded, and in the next settlement of the county treasurer with the state, the controller, if satisfied of the legality of such refunding by the said board, shall give such treasurer credit for the state's portion of the amounts so refunded, as prescribed in section three thousand eight hundred seventy-one of this code.

In school districts. When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other public corporation * * *."

Although section 3804 simply enumerates the circumstances under which a taxpayer may apply to the board of supervisors for a refund of taxes and does not provide

for an action at law after an adverse ruling, the state courts have in several instances entertained such actions.

There is, however, no decision of the state courts permitting a lessee to pay taxes assessed against the owner and to maintain an action under section 3804 to recover them. In the cases cited by petitioners in support of a contrary claim (Petitioners' Br. p. 73), the assessments had been separately made upon a leasehold or other qualified interest *as such;* an oil lease, with a right to take a part of the substance of the land itself, in the case of *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 Pac. 483; a leasehold interest for a long term of years in tide lands owned by the state, the property being exempt from taxation to the state as owner, in *San Pedro etc. R. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 Pac. 383; the interest of a purchaser of unpatented lieu lands in *Slade v. County of Butte*, 14 Cal. App. 453, 112 Pac. 485. In each of these cases the suit to recover the taxes paid under protest was brought by the plaintiff as the owner of the qualified interest which had been assessed.

Petitioners' argument that respondents, as lessees of the "talking sets", could pay the tax and sue under section 3804 to recover it is directly contrary to their argument (Br. pp. 70-72) that that section affords a "concurrent remedy" with section 3819 (under which only an "owner" can sue) and to their argument that as a general principle of taxation in California the owner of property is solely responsible for taxes (Petitioners' Br. pp. 143-144). We contend that this argument is wholly unsound (supra, pp. 52-55; infra, p. 134), but petitioners seriously make it and argue that respondents are in no

way liable for the tax; in other words, that they are mere interlopers without any right to pay it. How, then, under petitioners' contention, could respondents maintain an action under section 3804? We submit that they cannot justly be compelled to take the risk as to which of petitioners' conflicting theories the state court may adopt (*Railroad Commission of Minnesota v. Duluth St. R. Co.*, 273 U. S. 625, 628). A doubtful remedy is not adequate (Judicial Code, Sec. 267, U. S. C. 28:384, Comp. Stats. Sec. 1244).

Thus in *Davis v. Wakelee*, 156 U. S. 680, this court said:

> "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit * * *. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

In *Union Pacific R. Co. v. County Commissioners of Weld County*, 247 U. S. 282, a suit to enjoin the collection of county taxes, the county claimed that a state statute afforded an adequate remedy at law. In overruling this contention the court said (pp. 286-287):

> "Counsel differ widely respecting the effect of this statute on the earlier section (Sec. 5750, Rev. Stats. 1908) and on the substantive right given by it to have an erroneous or illegal tax refunded.
> * * * * * * * * *
> An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In

these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined."

See also:

Bohler, Tax Collector, et al., v. Callaway, 267 U. S. 479, 488 ("If the remedy by law is doubtful, equitable relief may be had");

Wilson, Tax Collector, v. Illinois Southern R. Co., 263 U. S. 574, 577 ("• • • The adequacy of a remedy at law must be clear");

Atlantic Coast Line v. Daughton, Commissioner etc., 262 U. S. 413, 426 ("holding that where state statutes claimed by defendants to afford an adequate remedy at law had not been construed by the State Supreme Court, the legal remedy was doubtful and therefore inadequate");

Dawson, Attorney General, v. Kentucky Distilleries Co., 255 U. S. 288, 296 ("It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit' ");

Wallace v. Hines, 253 U. S. 66, 68 ("• • • we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought").

Second: Even if under the state law respondents could pay the tax in dispute and bring an action to recover it, they could not recover interest prior to judgment.

It is settled in California that a plaintiff who recovers wrongfully collected taxes cannot in any sort of proceeding recover interest prior to judgment (*Engebretson v. City of San Diego*, 185 Cal. 475, 479-480, 197 Pac. 651; *Spencer v. City of Los Angeles*, 180 Cal. 103, 115, 179 Pac.

163; *Miller v. County of Kern*, 150 Cal. 797, 798, 799, 90 Pac. 119; *Savings and Loan Society v. San Francisco*, 131 Cal. 356, 363, 63 Pac. 665; *United Taxpayers v. San Francisco*, 55 Cal. App. 239, 243, 203 Pac. 120; *Southwest Land Co. v. County of Los Angeles*, 46 Cal. App. 9, 15, 188 Pac. 575).

The Circuit Court of Appeals held that recovery *without interest* of taxes paid under protest is not an adequate remedy (Tr. pp. 52-53). This conclusion is supported by at least three other cases. We know of no case to the contrary, and petitioners have cited none.

In *Birch v. Board of Supervisors of Orange County*, 191 Cal. 235, 215 Pac. 903, the trial court in certiorari proceedings had quashed an order of the supervisors increasing an assessment upon property of the plaintiff. The writ of certiorari, like that of injunction, is, of course, not issued where there is an adequate remedy at law (Code of Civil Procedure, Sec. 1068). In affirming the judgment the State Supreme Court said (p. 237):

> "The appellants contend that the plaintiffs have a plain, speedy, and adequate remedy by paying the tax and suing to recover the same under the provisions of section 3819 of the Political Code. It is true that the district court of appeal, in *Richard v. Council of Santa Barbara*, 49 Cal. App. 58 (192 Pac. 726) declined to set aside an assessment on the ground that the property owners had a plain, speedy, and adequate remedy by paying the tax and bringing suit to recover the same, but the plaintiffs in this case point out that under our decision in *Miller v. County of Kern*, 150 Cal. 797 (90 Pac. 119), *the petitioner is not entitled to recover interest upon the increased tax, which increase is about four thousand five hundred dollars, and for this reason that the remedy by suit to recover the tax is not adequate*" (italics ours).

In *Proctor & Gamble Distributing Co. v. Sherman, Attorney General, et al.* (S. D. N. Y.), 2 F. (2d) 165, the plaintiff sued to enjoin the Attorney General of New York and the members of the State Tax Commission from collecting certain corporation taxes, on the ground that the defendants, in computing the taxes, had ignored the distinct entities of the plaintiff and its subsidiaries. The defendants claimed that the plaintiff had an adequate remedy at law under the New York statute by paying the tax and suing to recover it. The court held that, inasmuch as this statute did not allow interest, the remedy under it was not adequate. The court said (p. 166):

> "But, *quite independently of such doubts, the relief is inadequate because of the express refusal to allow interest.* It is no answer to say that interest is not allowed against the sovereign (citing cases). The adequacy of the requisite legal remedy cannot be measured by the remedies one has against a person who is exempt from all process. If that were the test, the principal itself might be confiscated. While I have been referred to no decision on the point, *it seems to me plain that it is not an adequate remedy after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all.* Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong" (italics ours).

In *Southern Ry. Co. v. Query, et al., South Carolina Tax Commission*, 21 F. (2d) 333, decided since the decision of

the Circuit Court of Appeals, the same question was before a court of three judges, convened under section 266 of the Judicial Code (U. S. C. 28:380, Comp. Stats. Sec. 1243), to consider an application by the plaintiff for an injunction against the Tax Commission restraining the collection of additional income taxes. Plaintiff claimed that the legal remedy was inadequate, for the reason, among others, that the South Carolina law did not permit recovery of interest on taxes paid under protest. The court decided that the state law did permit the recovery of such interest, but nevertheless said (p. 342):

> "The plaintiff further insists that the provision contained in section 32 is inadequate, because it does not in express terms provide for interest. In a number of decisions by the Supreme Court of the United States, it was held that, where state statutes made a provision by which the aggrieved taxpayer could recover at law the taxes illegally exacted, such would be a complete remedy, and equity would not take jurisdiction. Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 285, 38 S. Ct. 510, 62 L. Ed. 1110, and cases there cited; Singer Sewing Machine v. Benedict, 229 U. S. 481, 33 S. Ct. 942, 57 L. Ed. 1288, and cases there cited. In the statutes in question in these cases there was apparently no express provision for the repayment of interest on the amount illegally exacted. But it may be said that the point of interest was not directly presented in those cases, and therefore the decisions in that respect are not conclusive, and to this view we are inclined to agree.
>
> Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious, or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means

> of compensation for the use of money lent or wrongfully detained. A sum of money to-day is worth more than exactly the same sum next month or next year, and we cannot ignore the fact that to take a man's money to-day and return him exactly the same sum at a later period does not afford full compensation for the wrong that has been done him. We think, therefore, that a remedy which does not provide for a reasonable amount of interest for the time of its detention would not be a complete remedy at law, and, if in this case we thought that the plaintiff would not be entitled in such action at law to recover interest, we would retain this bill."

The principle that interest on money due is an essential part of just compensation has been recognized by this court. In *Miller v. Robertson*, 266 U. S. 243, a suit by a seller against the Alien Property Custodian for breach of a contract of sale by individual German defendants, the court said (p. 258):

> "In this case, at least as early as June 29, 1916, the date of demand, the seller was entitled to have from the buyers the difference between the sum which it would have received prior to that date, if the buyers had kept their contract, and the amount it received on resale. Payment in 1924 or later of that sum is not full compensation."

In the case at bar the assessment exceeds $50,000 (Tr. p. 4). Judging by ordinary experience, it is safe to say that it would take a period perhaps of years to conclude a suit at law to recover the tax if paid. Interest during that time would be a substantial amount. In the meanwhile many if not all of the other 57 counties in the state might follow the example of Los Angeles County and attempt to tax leased "talking sets" used by respondent, The Pacific Telephone and Telegraph Company.

Upon such taxes the company would be penalized many thousands of dollars in interest, even if it were ultimately held at law that the taxes were unlawful.

A remedy at law, to be adequate, must be as effective and complete as the remedy in equity (Judicial Code, Sec. 267, U. S. C. 28:384, Comp. Stats. Sec. 1244; *Boyce v. Grundy*, 3 Pet. 210; *Tyler v. Savage*, 143 U. S. 79, 95; *Williams v. Neely* (8th C. C. A.), 134 Fed. 1, 10). In tax cases such remedy must allow the taxpayer, upon payment of the tax, to contest its validity without incurring unreasonable penalties and forfeitures (*Bank of Kentucky v. Stone*, 88 Fed. 383, 390, 391, affirmed 174 U. S. 409; *Wallace v. Hines*, 253 U. S. 66, 67; see also *Ex parte Young*, 209 U. S. 123). Such a remedy is, we submit, not afforded by an action at law in which interest is not allowed.

Petitioners go outside the record to say that respondents, by their present counsel, have brought suits against Los Angeles County under section 3804. Respondents have brought no suit against the county, except as owners under section 3819 of the Political Code, which, as already shown, is not available to them in this case.

Third: The county, if it collects the tax in dispute, will collect parts of it for sixteen separate municipalities. Respondents could recover the tax at law, if at all, only in a multiplicity of suits.

The defendant county is trying to collect substantial parts of the tax in dispute for the benefit of sixteen municipalities.*

* The tax bills in suit, some fifty in number, were received in evidence as Plaintiff's Exhibit 3 (Tr. p. 34).

All these municipalities (Tr. pp. 12-14) have availed themselves of the privileges conferred by the Act approved March 27, 1895, as amended (Deering's General Laws 1923, Vol. 2, p. 3531; Cal. Stats. 1895, p. 219, as amended) to have the County of Los Angeles collect their taxes for them. This act provides for the levy and collection of city taxes by county officials, where the legislative body of the municipal corporation so elects.

Under section 4 of this act, each municipality fixes its own tax rate. Section 5 provides that municipal taxes shall be collected at the same time and in the same manner as county taxes and that, when collected, they shall be paid to the treasurer of the municipal corporation to which they belong "under the general requirements and penalties provided by law for the settlement of other taxes". The general law requires the tax collector to pay all taxes in his hands to the county treasurer on the first Monday of each month (Pol. Code, Secs. 3753, 4126); and further, to make such payment "at least once a month, and oftener, in his discretion" (Pol. Code, Sec. 4126).

There is no statutory provision, other than section 3819 of the Political Code, making a county liable for taxes illegally or improperly collected for municipalities. That section, as shown, is not available to respondents as lessees. Section 3804 of the Political Code, as originally passed, made no reference to this subject and covered only refunds of state and county taxes. Under it the Supreme Court of the state decided that a taxpayer could not recover from the county taxes wrongfully collected by the county for and paid over to a school district (*Elberg v. County of San Luis Obispo*, 112 Cal. 316,

41 Pac. 475, 44 Pac. 572; *Pacific Mutual Life Ins. Co. v. County of San Diego*, 112 Cal. 314, 41 Pac. 423).

By amendments in 1901 (Stats. 1901, p. 648) and in 1907 (Stats. 1907, p. 755), the provision was added to section 3804 that school district or other municipal taxes might be refunded "out of any money * * * belonging to the appropriate fund of such school district or municipal or other public corporation".

How this amendment bears out petitioners' statement that the supervisors can refund "moneys collected as taxes on behalf of such other bodies in exactly the same manner as those on behalf of the county" (Petitioners' Br. p. 90), we confess we cannot understand. Whether the county would at any time have money available for tax refunds—and it is only from such money that refunds can be made—is a highly uncertain matter. The law requires that taxes collected for municipalities be paid to them monthly or oftener (Political Code, Secs. 3753, 4126, supra). *Moreover, under section 1 of the Act of March 27, 1895, any municipality may at any time withdraw from the arrangement whereby the county collects its taxes.*

Petitioners themselves say that the county's control of municipal money for refund purposes lasts "so long as the county retains possession of the money" (Petitioners' Br. pp. 90-91). The county, as above shown, cannot possibly retain such money during the period necessary to conclude an action at law over the tax in suit.

Furthermore, section 6 of the statute allows the county a percentage of the taxes which are collected for the municipalities for the cost of collecting them. There is

no provision of law for the repayment of such percentage of taxes illegally collected.

The Circuit Court of Appeals held, and we submit, correctly, that (Tr. p. 52):

> "if plaintiffs should pay the taxes in suit there would seem to be no certain way of obtaining complete refund except by suits against the county and the various municipalities. This would require plaintiffs to bring many suits, and in the event of recovery there would be no provision by which plaintiffs could recover the sums allowed the counties for the costs of collection."

The foregoing circumstances, we submit, show that any possible remedy at law to recover the tax in suit after payment would involve a multiplicity of suits, and is not adequate. In *Raymond, Treasurer, et al. v. Chicago Union Traction Co.*, 207 U. S. 20, the court said (pp. 38-40):

> "Finally it is objected that the appellee had a complete and adequate remedy at law by paying the amount of the warrant, and then suing the collector to recover the same back as money paid under duress, although upon a void warrant.
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> * * * * * * *
>
> In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions designated in his tax books to the city treasurer of the city of Chicago, the county treasurer of the county of Cook, the treasurer of the sanitary district, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of

the tax which would go to the State of Illinois could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commissions deducted for the collection of the tax, and in that way it was averred that the appellee would be subjected to great and irreparable injury, for which there was not a complete or adequate remedy at law. There was also the allegation, already referrd to in the foregoing statement, that if compelled to pay this enormous tax it would be rendered insolvent. We think all these allegations combined take the case out of the class where relief is prayed for, founded simply upon the unconstitutionality of the law under which the tax is levied, or upon the illegality for any other reason, of the tax itself, and bring the case within the jurisdiction of a court of equity."

In each of the following cases it was held that a taxpayer may enjoin collection of an illegal tax if, after payment, it would be distributed among several municipalities:

Wilson, County Collector, v. Illinois Southern R. Co., 263 U. S. 574, 576 577;

Waggoner, et al. v. Wichita County, 298 Fed. 818 (Aff. 5th C. C. A., 3 F. (2d) 962, Aff. 273 U. S. 113);

Waggoner v. Baylor County, 298 Fed. 822;

Bank of Arizona v. Howe, Commissioner, et al., 293 Fed. 600, 605;

Standard Oil Co. v. Howe, Commissioner, et al., 257 Fed. 481, 487;

Mayor etc. of Jersey City v. Central R. Co. (3rd C. C. A.), 212 Fed. 76, 82.

Fourth: The collection of the tax in dispute would work substantial injury to respondents and respondents are proper parties plaintiff in equity (Answering Petitioners' Br. pp. 103-104).

Petitioners' argument that respondents cannot maintain this suit and that the only proper plaintiff is the American Telephone and Telegraph Company, owner of the "talking sets", is, we submit, clearly untenable. If the "talking sets" were sold in satisfaction of the tax, the sale would carry respondents' leasehold interest. It is alleged and admitted that the seizure of the "talking sets" would disrupt respondents' systems by destroying the utility of all the instruments in Los Angeles County, of which the "talking sets" are integral parts (Tr. pp. 9, 17). Respondents' leasehold interest in the "talking sets" and their right to conduct the business in which they are engaged are valuable property rights, which manifestly may be protected in equity if no adequate legal remedy is available (see *Terrace v. Thompson, Attorney General, et al.*, 263 U. S. 197; *Truax v. Raich*, 239 U. S. 33).

A similar question has been presented in the several states where property leased by public utilities is not subject to local taxation against the owner because of taxes paid by the operating utility. In cases where a local assessment has nevertheless been made against the owner, the lessee has been allowed to contest the tax (*Merrill Railway etc. Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686; *City of Superior v. Allouez Bay Dock Co.*, 166 Wis. 76, 164 N. W. 362; *Wisconsin Electric Power Co. v. Town of Lake*, 186 Wis. 199, 202 N. W. 195; *People ex rel. Abt, County Collector, v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956; *People v. Illinois Northern R. Co.*, 248 Ill. 532, 94 N. E. 37; supra, pp. 65-69).

Manifestly, such lessee is entitled to contest the tax in equity if the state statutes afford no remedy at law.

CONCLUSION.

Petitioners invoke the "law of the land". This court has declared that the "law of the land" requires that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the bottom of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U. S. 312, 316, 317). In submitting this case for decision we, too, rely on the "law of the land". For, besides the fact, which we believe we have shown, that the tax in question was not contemplated by the framers of the state constitutional and statutory provisions on which petitioners rely for its enforcement and is not warranted by the terms of these provisions themselves, fundamental principles of justice, we submit, compel the conclusion that the double tax burden here sought to be enforced is unjust and unlawful and is not to be sanctioned.

It is respectfully submitted that the decree of the Circuit Court of Appeals is right and should be affirmed.

Dated, San Francisco,
November 25, 1927.

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Of Counsel.

(APPENDICES I AND II FOLLOW.)

Appendices I and II

Appendix I

CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF CALIFORNIA CONCERNING THE GROSS RECEIPTS TAX.

Constitution Section 14, Article XIII.

Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping car, dining car, drawingroom car and palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this State; companies doing express business on any railroad, steamboat, vessel or stage line in this State; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for State purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word "companies" as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.

(*a*) All railroad companies, including street railways, whether operated in one or more counties; all sleeping car, dining car, drawingroom car, and palace car companies, all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this State; all companies doing express business on any railroad, steamboat, vessel or stage line in this

State; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the State a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this State, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State, and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this State.

The percentages above mentioned shall be as follows: On all railroad companies, including street railways, four per cent; on all sleeping car, dining car, drawingroom car, palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies, three per cent; on all companies doing express business on any railroad, steamboat, vessel or stage line, two per cent; on all telegraph and telephone companies, three and one-half per cent; on all companies engaged in the transmission or sale of gas or electricity, four per cent. Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; *provided*, that nothing herein shall be construed to

release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this State.

(*b*) Every insurance company or association doing business in this State shall annually pay to the State a tax of one and one-half per cent upon the amount of the gross premiums received upon its business done in this State, less return premiums and reinsurance in companies or associations authorized to do business in this State; *provided*, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this State. This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided; *provided*, that when by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this State, doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the Legislature upon insurance companies of such other state or country doing business in this State.

(c) The shares of capital stock of all banks, organized under the laws of this State, or of the United States, or of any other state and located in this State, shall be assessed and taxed to the owners or holders thereof by the State Board of Equalization, in the manner to be prescribed by law, in the city or town where the bank is located and not elsewhere. There shall be levied and assessed upon such shares of capital stock an annual tax, payable to the State, of one per centum upon the value thereof. The value of each share of stock in each bank, except such as are in liquidation, shall be taken to be the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits. The value of each share of stock in each bank which is in liquidation shall be taken to be its pro rata of the actual assets of such bank. This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided. In determining the value of the capital stock of any bank there shall be deducted from the value, as defined above, the value, as assessed for county taxes, of any real estate, other than mortgage interests therein, owned by such bank and taxed for county purposes. The bank shall be liable to the State for this tax and the same shall be paid to the State by them on behalf of the stockholders in the manner and at the time prescribed by law, and they shall have a lien upon the shares of stock and upon any dividends declared thereon to secure the amount so paid.

The moneyed capital, reserve, surplus, undivided profits and all other property belonging to unincorporated banks or bankers of this State, or held by any bank located in this State which has no shares of capital stock, or employed in this State by any branches, agencies, or other representatives of any banks doing business outside of the State of California, shall be likewise assessed and taxed to such banks or bankers by the said Board of Equalization, in the manner to be provided by law and taxed at the same rate that is levied upon the shares of capital stock of incorporated banks, as provided in the first paragraph of this subdivision. The value of said property shall be determined by taking the entire property invested in such business, together with all the reserve, surplus, and undivided profits, at their full cash value, and deducting therefrom the value as assessed for county taxes of any real estate, other than mortgage interests therein owned by such bank and taxed for county purposes. Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of the banks and bankers, mentioned in this paragraph, except county and municipal taxes on real estate and except as otherwise in this section provided. It is the intention of this paragraph that all moneyed capital and property of the banks and bankers mentioned in this paragraph shall be assessed and taxed at the same rate as an incorporated bank, provided for in the first paragraph of this subdivision. In determining the value of the moneyed capital and property of the banks and bankers mentioned in this subdivision, the said State Board of Equalization shall include and assess to such banks all property and everything of value owned or held by them, which go to make

up the value of the capital stock of such banks and bankers, if the same were incorporated and had shares of capital stock.

The word "banks" as used in this subdivision shall include banking association, savings and loan societies and trust companies, but shall not include building and loan associations.

(*d*) All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the State.

(*e*) Out of the revenues from the taxes provided for in this section together with all other State revenues, there shall be first set apart the moneys to be applied by the State to the support of the public school system and the State University. In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the State, including the above named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax for State purposes, on all the property in the State including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in subdivisions *a*, *b*, and *d* of this section shall be subject to taxation in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, before the adoption of this section. The taxes so paid for prin-

cipal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes for State purposes.

(*f*) All the provisions of this section shall be self-executing, and the Legislature shall pass all laws necessary to carry this section into effect, and shall provide for a valuation and assessment of the property enumerated in this section, and shall prescribe the duties of the State Board of Equalization and any other officers in connection with the administration thereof. The rates of taxation fixed in this section shall remain in force until changed by the Legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts and gross premiums herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section; and all laws in relation to such taxes in force at the time of the adoption of this section shall remain in force until changed by the Legislature. Until the year 1918 the State shall reimburse any and all counties which sustain loss of revenue by the withdrawal of railroad property from county taxation for the net loss in county revenue occasioned by the withdrawal of railroad property from county taxation. The Legislature shall provide for reim-

bursement from the general funds of any county to districts therein where loss is occasioned in such districts by the withdrawal from local taxation of property taxed for state purposes only.

(*g*) No injunction shall ever issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law. [*New section adopted November 8, 1910.*]

Political Code Sections 3664, 3664a, 3664d, 3664e, 3665a, 3665b, 3665c, 3666, 3668a and 3668c.

SEC. 3664. TAXES FOR STATE PURPOSES. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping-car, dining-car, drawing-room car and palace-car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be assessed and levied by the state board of equalization, and collected in the manner hereinafter provided. The word "company" and the word "com-

panies" as used in section fourteen of article thirteen of the constitution of this state and in the sections of this code enacted to carry the same into effect shall include persons, partnerships, joint stock associations, companies, and corporations.

Sec. 3664a. Public Utilities to Pay State Tax. 1. All railroad companies, including street railways, whether operated in one or more counties; all sleeping-car, dining-car, drawing-room car and palace-car companies, all refrigerator, oil, stock, fruit, and other car-loaning, and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel, or stage line in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state.

2. Companies Partly Within and Without State. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

3. Percentages. The percentages above mentioned shall be as follows: On all railroad companies, seven per cent; on all street railways, herein defined to include interurban electric railways and gasoline propelled railways, five and a quarter per cent; on all sleeping-car, dining-car, drawing-room car, palace-car companies, refrigerator, oil, stock, fruit, and other car-loaning, and other car companies, five and one-quarter per cent; on all companies doing express business on any railroad, steamboat, vessel or stage line, one per cent; on all telegraph and telephone companies five and one-half per cent; on all companies engaged in the transmission or sale of gas or electricity, seven and one-half per cent.

4. In Lieu of Other Taxes. Such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except as otherwise provided in section fourteen of article thirteen of the constitution of this state.

5. "Municipal" Defined. Percentage for Street Railways. The word "municipal" as used in section fourteen of article thirteen of the constitution of this state and in the sections of this code enacted to carry the same into effect shall apply to incorporated towns and cities formed under article eleven of the constitution of this state and to none other.

In the event that it shall be hereafter finally determined by the courts that the legislature is without power to fix a different percentage upon the gross receipts from operation of street railways than the percentage herein fixed for railroad companies, then the percentage upon the gross receipts from operation of street railways is hereby fixed at seven per cent.

Sec. 3664d. Assessment and Tax of Franchises. All franchises, other than those of the companies mentioned in sections three thousand six hundred sixty-four *a*, three thousand six hundred sixty-four *b*, and three thousand six hundred sixty-four *c* of this code, shall be assessed at their actual cash value, after making due deduction for goodwill, in the manner hereinafter provided, and shall be taxed at the rate of one and six-tenths per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state. These franchises shall include the actual exercise of the right to be a corporation and to do business as a corporation under the laws of this state and the actual exercise of the right to do business as a corporation in this state when such right is exercised by a corporation incorporated under the laws of any other state or country, also the right, authority, privilege, or permission to maintain wharves, ferries, toll roads, and toll bridges, and to construct, maintain or operate, in, under, above, upon, through or along any streets, highways, public places, or waters, any mains, pipes, canals, ditches, tanks, conduits or other means for conducting water, oil, or other substances.

Sec. 3664e. Investigations, Appraisements, and Valuations. The state board of equalization shall make, or cause to be made, such investigations, appraisements and valuations and collect such other data as it deems proper for the purpose of enabling it to report to each legislature at the convening thereof, the relative percentages of tax borne by corporations and industries paying taxes to the state under part III, title IX, of this code as compared to the percentage or rate of ad valorem tax

borne by property taxed for local, county, city and county, city or district purposes, and shall include its findings thereon in its biennial report to the governor, as required under section 3692 of this code.

Sec. 3665a. "Gross Receipts From Operation" Defined. Hearing on Claim of Double Taxation. 1. The term "gross receipts from operation" as used in section three thousand six hundred sixty-four *a* of this code is hereby defined to include all sums received from business done within this state, during the year ending the thirty-first day of December last preceding, including the company's proportion of gross receipts from any and all sources on account of business done by it within this state, in connection with other companies described in said section.

Any company claiming that the levy of the percentage fixed by section three thousand six hundred sixty-four *a* of this code on the total gross receipts of such company results in double taxation of the property of such company, may make application to the state board of equalization for a hearing on such matter. Said board shall have power to take evidence and determine the facts with respect to such claim and in event said board finds the claim of such company to be true, said board may authorize such company to deduct from its reported gross receipts that amount of such receipts which, if included in such total gross receipts, would cause such double taxation.

2. Companies Partly Within and Without State. In case of companies operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and end-

ing within this state, and the proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into or out of this state.

3. No Deductions Allowed. No deduction shall be allowed from the gross receipts from operation for commissions, rebates, or other repayments, except only such refunds as arise from errors or overcharges; nor shall any deduction be allowed for payments from gross receipts to other companies for any purpose whatsoever, except such refunds as arise from errors or overcharges.

4. Income From Nonoperative Property Not Included. Income derived from property not defined in this section and in sections three thousand six hundred sixty-four *a*, three thousand six hundred sixty-five *b* and three thousand six hundred sixty-five *c* of this code as operative property shall not be included in the gross receipts for the purpose of determining the tax on the property and franchises provided for in section three thousand six hundred sixty-four *a* of this code.

Sec. 3665b. "Operative Property". The term "operative property" as used in any section of this code shall include:

(a) Railroad Companies. In the case of railroad companies, including street railways: The franchises, roadway, roadbed, rails, rolling stock, rights of way, sidings, spur-tracks, switches, signal systems, cranes and structures used in loading and unloading cars, fences along the right of way, poles, wires, conduits, power lines, piers, used exclusively in the operation of the railroad business, depot grounds and buildings, ferry-boats, tugs and car-floats

used exclusively in the operation of the railroad business; machine-shops, repair-shops, roundhouses, car barns, power-houses, substations, and other buildings, used in the operation of the railroad business and so much of the land on which said shops, houses, barns, and other buildings are situate as may be required for the convenient use and occupation of said buildings.

(b) Car Companies. In the case of sleeping car, dining car, drawing-room car and palace-car companies, refrigerator, oil, stock, fruit and other car-loaning, and other car companies operating upon railroads in this state: The franchises, cars, and other rolling stock.

(c) Express Companies. In the case of companies doing express business on any railroad, steamboat, vessel or stage line in this state: The franchises, cars, trucks, wagons, horses, harness, and safes.

(d) Telegraph and Telephone Companies. In the case of telegraph and telephone companies doing business in this state: The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings.

(e) Gas and Electric Companies. In the case of companies engaged in the transmission or sale of gas or electricity: The franchises, towers, poles, wires, pipes, canals, tunnels, ditches, flumes, aqueducts, conduits, rights of way, dams, reservoirs, water and water rights used exclusively

in the business of the transmission or sale of gas or electricity; transformers, substations, gas-holders, gas and electric generators, switches, switchboards, meters, electrical and gas appliances, oil-tanks, power plants, powerhouses, and other buildings and structures used in the operation of the business of the transmission or sale of gas or electricity and so much of the land on which said buildings and structures are situate as may be required for the convenient use and operation of said buildings; provided, that the operative property of the companies enumerated in this section, shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section three thousand six hundred sixty-four *a* of this code. The operative property mentioned in subdivisions (a), (b), (c), (d), and (e), of this section shall not be subject to taxation for county, municipal, or district purposes except as otherwise provided for in the constitution and laws of this state; provided, however, that when any piece or parcel of property in this state owned by any of the companies mentioned in section three thousand six hundred sixty-four *a* of this code is used partially by such company for any use reasonably necessary to the operation of any of the lines of business enumerated in said section and such property is also partially rented to or used by others or is partially used by the company for some other lines of business not among those so enumerated, or for purposes not reasonably necessary to the operation of any of said enumerated lines of business, it shall be considered operative property in that proportion only which that part of the property

mentioned in the proviso used by the company in the operation of any of said enumerated lines of business bears to the whole of the property mentioned in this proviso.

2. Construction Property Nonoperative. Any property of the classes mentioned in this section owned by a company constructing a new railroad, street railway, telegraph or telephone system, or plant or system for the transmission or sale of gas or electricity, no part of which new road, line, plant or system is in operation, and the same classes of property when held by an operating company solely for the construction of a new railroad or railway line, a new telegraph or telephone system, or a new plant or system for the transmission or sale of gas or electricity, and not to be used for betterments or additions to roads, lines, plants, or systems already under operation, shall not be considered operative property and shall be subject to assessment and taxation for county, municipal, and district purposes. Any part of such property of any company mentioned in this section shall be classed and assessed as operative property when the state board of equalization shall determine that such property is rendering a substantial public service.

3. Rules of State Board of Equalization. The state board of equalization shall have power to make rules and issue instructions not inconsistent with the constitution and laws of this state for the guidance of assessors in determining what is operative property and what is nonoperative property of companies named in this section.

Sec. 3665c. Annual Report by Companies. Such person or officer, as the state board of equalization may designate, of each of the companies mentioned in section three

thousand six hundred sixty-four *a* of this code, shall within ten days after the first Monday in March of each year, file with the said board a report signed and sworn to by one or more of said persons or officers, showing in detail for the year ending the thirty-first day of December last preceding, the various items as follows:

1. NAME, ETC. The name of the company, its nature, whether a person or persons, a partnership (with names of partners), an association, or corporation, and under the laws of what state, territory or country organized, the nature of its business, the location of its principal place of business, the names and post office addresses of its president, secretary, auditor, treasurer, superintendent, and general manager, the location of its principal place of business in this state, the name and post office address of its chief officer or managing agent in this state, and the names and addresses of all subsidiary companies whose property and business are operated by it and the names and addresses of any company of which it may be subsidiary.

2. OPERATIVE PROPERTY. Each of the companies mentioned in said section shall report, in such detail as the state board of equalization shall prescribe, all of its property in this state which comes under the definition of operative property in section three thousand six hundred sixty-five *b* of this code. When any such company operates both within and without this state it shall report the mileage over which it operates both within and without this state. It shall also report the location of said property within this state by counties, cities and counties, municipalities, and districts, in such manner and in such detail

as said board of equalization shall prescribe. It shall also, at the same time, furnish a duplicate of the report covering so much of said property as is located in any county, city and county, municipality, or district, to the assessor of the county, city and county, city or district in which such property is located. The state board of equalization may require the filing in its office of maps descriptive of all the operative property of any such companies, and may prescribe the form and size of such maps and the details to be shown therein, and may require that similar maps descriptive of the operative property within each county, city and county, municipality, or district, shall be filed in the assessor's office in each county, city and county, city or district in which any of said property is located.

3. Capital Stock. The amount of capital stock issued, and the amount of money received therefor, showing separately the capital stock issued, and the money received therefor of the operating company and of each subsidiary company in this state.

4. Dividends. The dividends paid during the year ending the thirty-first day of December last preceding, the surplus fund, if any, on said thirty-first day of December, or between such periods as the state board of equalization may determine, those of the operating company and of each subsidiary company in this state to be shown separately.

5. Debts. The funded and floating debts and the rate of interest thereon, showing separately the debts of the operating company and of each subsidiary company in

this state, on the thirty-first day of December last preceding.

6. Value of Stock. The market value of the stock and of the outstanding bonds, or, when said stock or bonds have no market value, the actual value thereof, for such periods and for such dates as the state board of equalization shall prescribe.

7. Improvements. The amounts expended for improvements during the year ending the thirty-first day of December last preceding, how expended and the character of the improvements.

8. Gross Receipts. The gross receipts from operation within this state for the year ending the thirty-first day of December last preceding, the gross receipts from such classes of business as the state board of equalization may designate, to be reported separately; also where the property and business are partly within and partly without this state, the gross receipts for said period on all business beginning and ending entirely within this state, and that proportion of the gross receipts from all business passing through, into, or out of this state, which the mileage within this state bears to the total mileage over which such interstate business is done as further defined in section three thousand six hundred sixty-five *a* of this code.

9. Expenses. The operating and other expenses.

10. Profit and Loss. The balance of profit and loss, between such periods as the state board of equalization may determine.

11. Other Matters. Subsidiary Companies. Defined. Such other matters as the state board of equalization may

deem necessary in order to enable it to assess and levy the taxes provided for in section fourteen of article thirteen of the constitution of this state.

Each such company shall include in its report the property and business of all subsidiary companies as that term is hereinafter defined in this section, whose property and business are operated by it, whether by virtue of a lease, an operating contract or agreement, or by virtue of control, through the ownership of stock or otherwise, even though such subsidiary companies maintain an independent legal existence and separate accounts.

The term "subsidiary company" is hereby defined as applying to a company which is merged in the operating system of an operating company in any of the ways above stated, whose property and franchises would be taxable under section three thousand six hundred sixty-four *a* of this code if the same were operated independently. No separate report need be rendered by a subsidiary company whose property, franchises, and operations are fully and completely covered by the report of an operating company, unless the state board of equalization shall deem such a separate report necessary.

Each such company operating the property or business of a subsidiary company in some line of business to which a different percentage of the gross receipts is applied by said section from that applied by said section to the gross receipts of the operating company, shall report such receipts of the subsidiary company separately.

Sec. 3666. Notice by Assessor of Property Regarded Nonoperative. Hearing. 1. If any assessor finds in the

report of the operative property in his county, city and county, municipality, or district, furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as nonoperative property, or partially operative and partially nonoperative, he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. He shall also mail a copy of the notice to the company whose property is involved. The said board shall investigate the nature of the property and its use, and if an agreement between the said board, the assessor, and the company as to the proper classification of such property cannot be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing, at which the assessor and the company may be present or represented. At such hearing the board shall, from the evidence presented and from the best information it can obtain decide the matter in dispute, and determine whether such property is operative or nonoperative or in what proportion operative and in what proportion nonoperative. The said board shall enter its decision in its minutes, and shall send a copy thereof to the county assessor and the company, and also to the proper officer of any municipality affected thereby. Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company unless set aside by a court of competent jurisdiction, and each such assessor must note the decision of his assessment-roll, and must assess such property accordingly.

2. Notice by State Board of Equalization of Property Regarded Nonoperative. Hearing. If the state board of equalization shall find in the report of operative property furnished to said board by any company under the provisions of section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which said board regards as nonoperative property, or partially operative and partially nonoperative, the board shall, within thirty days after receiving such report, notify said company thereof in writing, which notice shall contain a general description of the property and the reasons for regarding the same as nonoperative. It shall also mail a copy of the notice to any assessor in whose county, city and county, municipality, or district the property is located. If an agreement between the said board, the assessor, and the company as to the proper classification of such property cannot be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing, at which the assessor and the company may be present or represented. At such hearing the board shall, from the evidence presented and from the best information it can obtain, decide the matter in dispute, and determine whether such property is operative or nonoperative, or in what proportion operative and in what proportion nonoperative. The said board shall enter its decision in its minutes, and shall send a copy thereof to the county assessor and the company, and also to the proper officer of any municipality affected thereby. Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company, unless set aside by a court of competent ju-

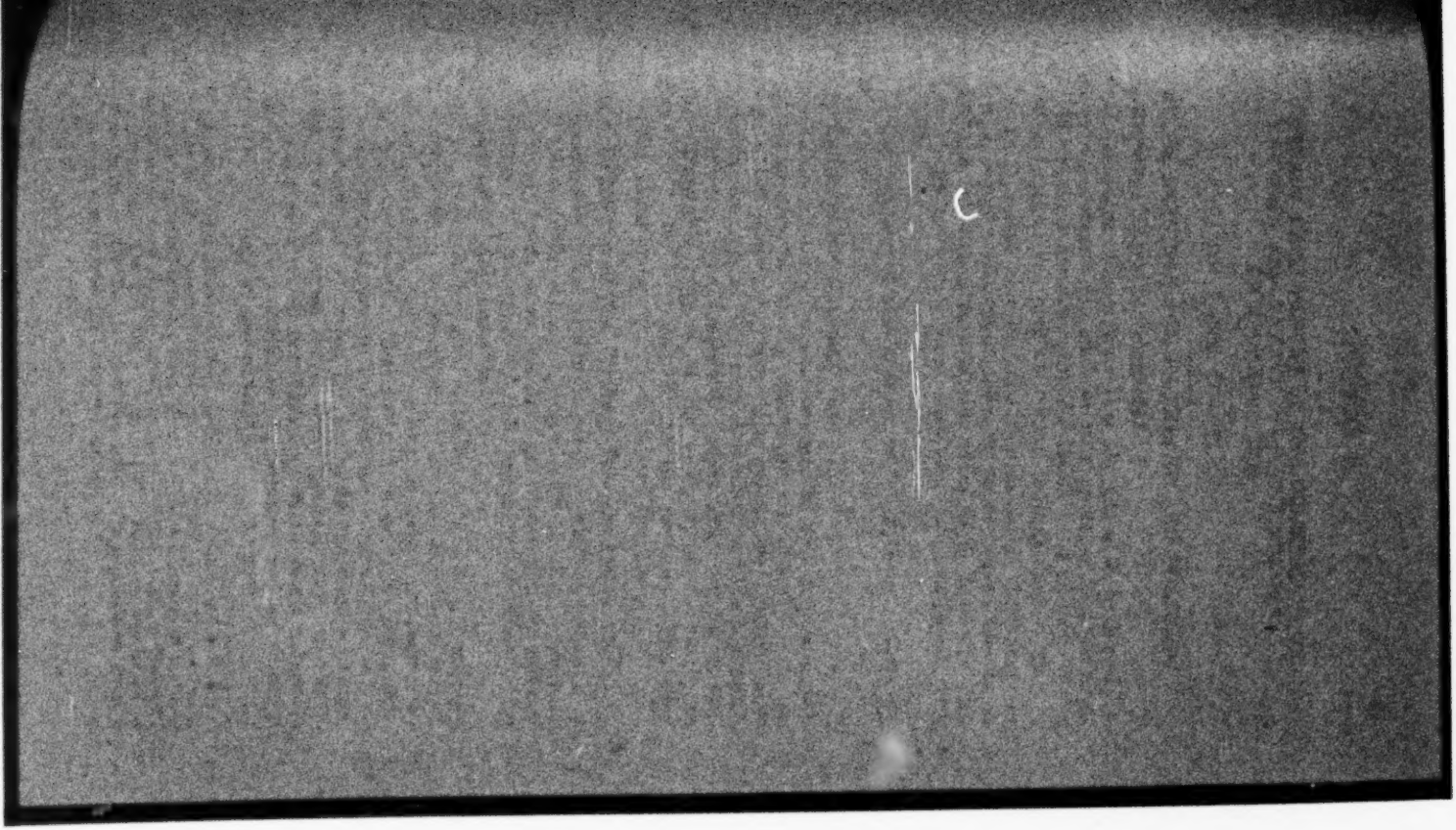
risdiction, and each such assessor must note the decision on his assessment-roll and must assess the property accordingly.

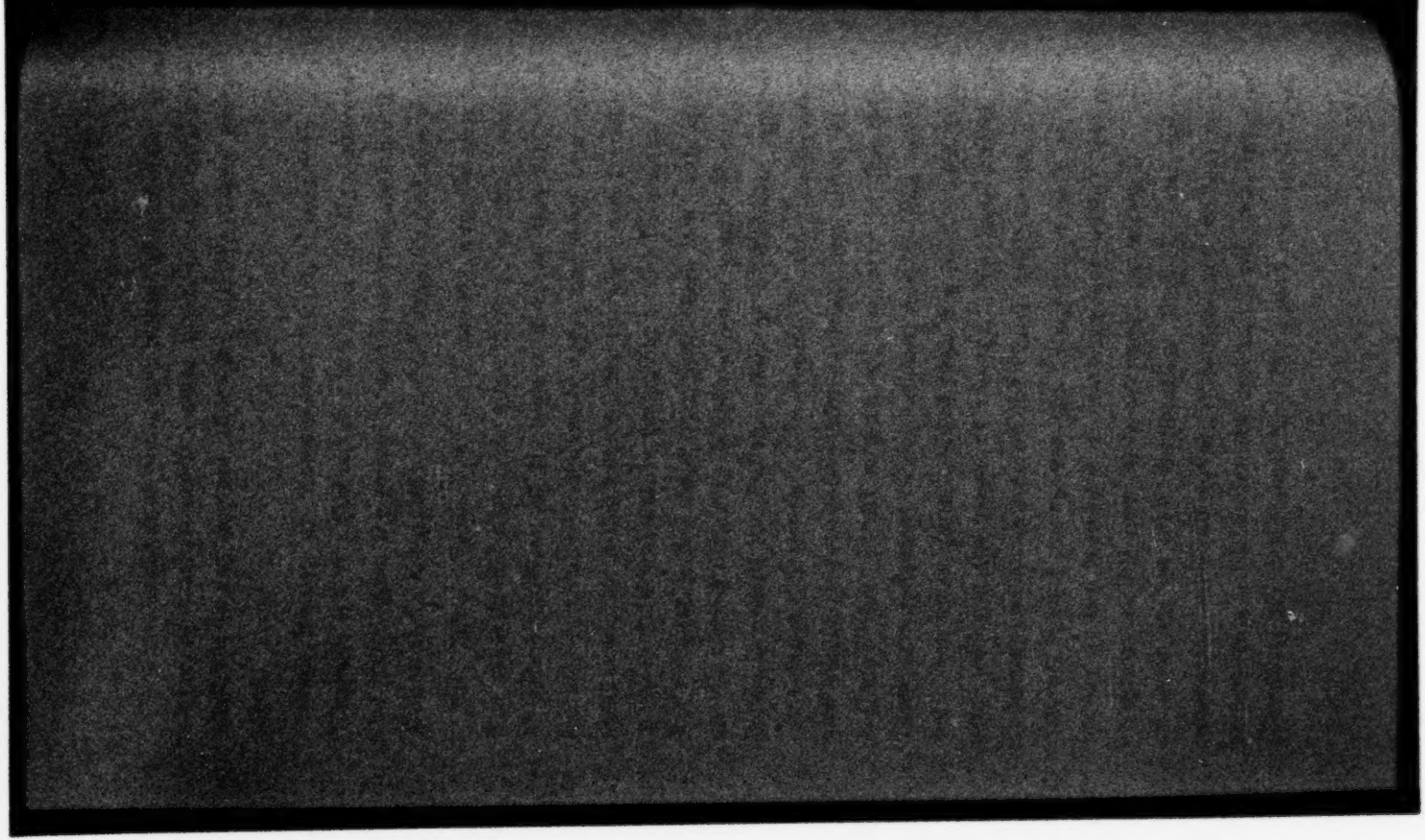
Sec. 3668a. Record of Assessments for State Taxes. Certificate. The state board of equalization must prepare each year a book, in one or more volumes, to be called the "record of assessments for state taxes", in which must be entered, either in writing or printing, or by both writing and printing, each assessment and levy made by said board upon the property and franchises mentioned in section three thousand six hundred sixty-four of this code, describing the property assessed, and such assessments shall be classified and entered, in such separate parts of said record as the board shall prescribe. On the first Monday in July the secretary of the state board of equalization must deliver to the controller of state the record of assessments for state taxes, certified to by the chairman and secretary of the board, which certificate shall be substantially as follows: "We, _____, chairman, and _____, secretary, of the state board of equalization of the state of California do hereby certify that between the first Monday in March and the first Monday in July, 19__, the state board of equalization made diligent inquiry and examination to ascertain all property and companies subject to assessment and taxation for state purposes, as required by the constitution of this state; that said board has faithfully complied with all the duties imposed upon it by the constitution and laws of the state of California; that said board has not imposed any unjust or double assessment through malice or ill will, or otherwise; nor allowed any company or property to escape a just assessment through favor or reward, or otherwise."

But the Failure to Subscribe Such Certificate to such record of assessments for state taxes, or any certificate, shall not in any manner affect the validity of any assessment.

Such Record of Assessments Shall Constitute the Warrant for the Controller to collect the taxes assessed and levied upon the property and franchises mentioned in section three thousand six hundred sixty-four of this code.

Sec. 3668c. Taxes Lien on Property and Franchises. The taxes levied under the provisions of section fourteen of article thirteen of the constitution of this state and sections of this code enacted to carry the same into effect shall constitute a lien upon all the property and franchises of every kind and nature belonging to the companies subject to taxation for state purposes, which lien shall attach on the first Monday in March of each year. Every tax herein provided for has the effect of a judgment against the company, and every lien created by the constitutional and statutory provisions aforesaid has the effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until such taxes, penalties and costs are paid, or the property sold for the payment thereof. No final discharge in bankruptcy or decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or the secretary of state file any such discharge or decree, or file any other document by which the term of existence of any corporation shall be reduced or terminated until all taxes, penalties, and costs due on assessments made under the constitutional and statutory provisions aforesaid shall have been paid and discharged.





APPENDIX II.

EXTRACT FROM REPORT OF THE COMMISSION ON REVENUE AND TAXATION OF THE STATE OF CALIFORNIA — 1906.*

CHAPTER III.

GROSS EARNINGS TAX IN THEORY AND PRACTICE.

Gross Earnings Taxes Recommended.

The Commission recommends that the taxes to be levied on public-service corporations shall be in proportion to gross earnings. The reasons for this recommendation must be made clear, for a large part of the plan of reform depends upon them.

It is furthermore certain that, as this is an innovation in California, many persons will desire to satisfy themselves as to whether the rates recommended for taxes to be levied in proportion to gross earnings are just and fair compared with other taxes.

It is the purpose of this chapter to bring these matters together.

Theory Demands Net Earnings Tax.

Theoretically all taxes, by whatever method they may be levied, should be apportioned among the taxpayers of every class according to net income. Theoretical writers on taxation have never advanced beyond the idea embodied in Adam Smith's famous dictum: "The subjects of every State ought to contribute toward the support of the government, as nearly as possible, * * * in proportion to the revenues which they respectively enjoy under the protection of the State."

Practical Difficulties of Net Earnings Tax Are Insuperable.

But practically it has proven impossible, without resorting to methods too inquisitorial to be consonant with that freedom of the individual, which is so jealously guarded under our system of government, to ascertain the net income of individuals for the purpose of levying taxes thereon.

There are two possible good substitutes for the theoretically good but practically unworkable tax on net income. One is a tax on the property, the other a tax on gross earnings. We know by bitter experience that the tax on property fails, especially where large corporate interests are affected. A tax on the gross earnings, at rates for the different classes of corporations which recognize in a broad general way the differences in the proportion of net earnings therein, is the substitute recommended by this Commission, in certain cases in which it seems to be practicable and equitable.

* This report is an appendix to the Journals of the Senate and Assembly—37th Session of the Legislature of the State of California, 1907, Volume 2. The report is also found in a separate official publication issued by the state printing office (*Bankers Life Co. v. Richardson*, 192 Cal. 113, 218 Pac. 586; *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057; *Southern Pacific Co. v. Lewis District No. 1*, 172 Cal. 345, 156 Pac. 502). The reprint here given is a page for page reprint from the latter publication.

The Justice and Equality of a Gross Earnings Tax.

It is not claimed that the gross earnings tax will be absolutely just and equitable in its effect upon each corporation in each of the different classes. No tax system has ever been devised which is strictly just. *But it is claimed that in certain cases such a tax would result in a far closer approximation to justice and equality than any other tax which this State could select.* The burden of taxation imposed thereby will vary from year to year as the fund out of which the taxes must be paid varies. A careful examination of the effect of the taxes, at the rates proposed, upon the individual corporations shows that the differences are practically unimportant.

The very able Ontario Commission on Railway Taxation, which reported in 1905, says:

Finding, then that the gross earnings tax would cause no substantial inequality in the case of the roads operating in Ontario, and that, as regards equality, there is little to choose between taxing on the gross and on the net earnings basis, the choice between these might very well be determined on the ground of facility and certainty in ascertaining what is gross and what is net revenue. But there is very little difficulty and dispute in determining what is gross revenue, while there is endless difficulty and dispute in determining what is net revenue, especially where it is to the interests of the companies to minimize net revenue in order to escape taxation. Hence, there would seem to be no hesitation in selecting gross revenue as the simplest and most direct, and considering all the roads, the most equitable basis for taxation.

The essential fairness of taking earnings as a basis for the taxation of corporations is based on the general principle that the taxes vary with the capacity of the company to pay them, whereas taxation on the basis of general property results in all manner of inequality. The amount of tangible property required by the various corporations has, in the first place, no necessary relation to their relative earning power, and, in the second place, bears no accurate relation to the earning power of the same company at different periods. The capital stock tax has something of the same defect in addition to those already mentioned, yet it has a certain amount of flexibility. Only the tax on earnings follows automatically the capacity of the corporation to pay, and while even it has its inequalities, yet it is very much more equitable than any other practical system.

Practical Advantage of a Gross Earnings Tax.

Taxation is of necessity largely a matter of expediency, and practical considerations naturally outweigh theoretical ones. The advantages of a gross earnings tax on public-service corporations are largely practical. They are: (1) *Certainty and ease of administration.* Gross earnings can be concealed or misrepresented only by outright and easily detected fraud. Unlike property values or net earnings they are not affected by differences of opinion and depend on nobody's judgment or discretion. They are often a matter of published record. After the gross earnings are determined the rest is a matter of mere arithmetical computation. (2) They follow the capacity of the taxed subject to pay. (3) They enter every year in the same proportion into the accounts and can be computed in advance. (4) They are less likely

to be shifted from the taxpayer to some one else than any other tax. (5) In the words of the Ontario Commission above referred to:

One of the most important advantages of the gross earnings tax is that **it does away with the difficulty about the taxation of franchises.** Probably no aspect of modern economic wealth has given rise to such elaborated and confused discussion and even outlandish theorizing as the so-called "franchise" values. Without attempting to follow the lines of popular discussion on the subject, it may be sufficient here to indicate briefly that there are two distinct senses in which the term "franchise" is used to indicate a property or economic value. It is the confusion of these two economic phrases, with the occasional introduction of purely legal aspects of franchise, which has contributed so much to the darkening of counsel on the subject.

HOW TO DETERMINE THE RATES FOR GROSS EARNINGS TAXES ON THE DIFFERENT CLASSES OF CORPORATIONS.

Equal Taxation.

In all of those states in which, in recent years, a change has been made in the taxation of public-service corporations, either from the ad valorem system to a gross earnings tax, or from a gross earnings tax back to an ad valorem system, or in which any substantial change or reform has been suggested in regard to the taxation of public-service corporations, the question has always been raised whether the proposed rates or methods of taxation for such companies would result in "equal taxation". It is difficult to determine exactly what is meant, in this connection, by "equal taxation", but in the popular mind, as expressed during the discussions of such proposed reforms, there has been an idea that, by whatever method a railroad, for example, may be taxed, the burden of taxation thereon should be, and must be, as heavy as that which is borne by a farmer or by an owner of real estate and personal property on the regular assessment rolls. The idea seems to be that if the tax is levied upon the gross earnings, it must result in the imposition upon a railroad or other public-service corporation of a burden fairly equal to that which it would bear if fully assessed on an ad valorem basis as any other property might be.

In view of the strength of the popular feeling that taxes should be "equal", and of the obvious and essential justice of such a demand, it is highly important to discover a practical method for determining whether the burden of a tax which it is proposed to impose upon the gross earnings of a given class of corporations is the equivalent or not of a tax which might be levied under an ad valorem plan. Such a method has been devised by this Commission. By the application of this method we can ascertain what rate of tax on the gross earnings is the equivalent of a given tax rate on the property, and *vice versa*. This will make it possible to compare any proposed gross earnings tax with an assumed "fair" rate on property.

Briefly stated that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on the property.* *This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion.* But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions.

Classification of Corporations.

The first step in the application of this method by the Commission was the determination of the class to which a corporation belongs by virtue of the percentage which its net earnings bears to its total gross earnings. An examination of the accounts of different classes of public-service corporations showed that they fall into very distinct classes according to the percentage which their net earnings bear to their gross earnings. This does not mean that every company belonging to a given class has the same percentage of net earnings to gross. But merely that *each of the great classes of public-service corporations presents a type* to which the individual companies tend to conform, and from which they differ only while young or while for some other reason incomplete or imperfect.

Thus, for example, we found that railroad companies, operating steam railroads, normally pay about 64% of their gross earnings for operating expenses, leaving 36% to pay interest upon bonded indebtedness, dividends upon capital, and similar items. That is, out of every $100 received, $64 goes to pay for wages, fuel, maintenance of way and equipment, and other items of cost involved in operation, and $36 is left for payment of interest on bonds, dividends on stock, and similar items. It is this $36 which gives value to the property. For fifteen years this average rate has not varied in the United States as a whole more than two points. City water companies, to take another example, ordinarily have a very much lower percentage of operating expenses, often as low as 25%, and consequently have as high as 75% net earnings, or funds available for the payment of interest and dividends. Other classes of corporations again, such as the telephone companies and express companies, have relatively high operating expenses and

* Expressed algebraically, let t equal the tax rate sought, n equal the percentage of net earnings to gross, i equal the interest rate on the investment, and r equal the given tax rate on property; then: $t = \frac{n}{i} \times r$.

only a small proportion of net revenues. As it is the amount of net revenue which determines the value of the property of these corporations as of any other property, so on the well-known principle of "capitalizing" the income at a predetermined or agreed rate of interest, it will readily be seen that a corporation with net returns large in proportion to its gross earnings has a larger property or capital value than one with a smaller percentage of net earnings. For example, as has been said, railroads earn about 36% net out of all receipts, and if this were capitalized at 6% would have $600 of capital for every $100 of gross earnings; another class of corporations earning, say, 24% net, would, if capitalized at 6%, have $400 worth of property for every $100 of gross income, while a city water company with 60% net, if capitalized at 6%, would have $1,000 worth of property for every $100 of gross income. If, however, 8% be taken as the rate of interest constituting a fair return to be allowed the stock and bond holders upon their investment, and as the basis for capitalization, these sums would change, and railroads with 36% net would have $450 of capital for every $100 of gross earnings; a company with 24% net would have $300 of capital for every $100 of gross earnings, and a water company with 60% net would have $750 for every $100 of gross earnings.

Computing the Tax Rate.

In order to compute what rate of taxation on gross earnings is the equivalent of a given rate of taxation on the property, we have simply to divide the percentage of net earnings by the assumed rate of capitalization and multiply the result by whatever tax rate on the property we wish to compare the gross earnings rate with. Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½% on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8 whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6%, 9% as an equivalent rate on gross earnings, or at 8% as a basis of capitalization, 6¾%. If the tax rate on property or capital were fixed at 1%, the above rates would become 6% and 4½%.

Net Earnings Defined.

In applying the above method it is obvious that we must have a fixed and uniformly applied definition of what constitute net earnings. Since the object of ascertaining the net earnings is to ascertain from them the value of the property, it is obvious that the net earnings should include all things and only such things as belong to the owners of the property, whether they be the stockholders, or the bondholders, or the lessors of property used by the corporation. Hence the

operating expenses, which are deducted from the gross earnings in order to ascertain the net earnings in this sense, should include only the bare expenses of operation and of maintenance to the narrowest sense of those terms. The operating expenses would include, in the case of a railroad, only the items which are denominated and defined by the Interstate Commerce Commission as "maintenance of way and structures," including: "repairs of roadway and renewal of rails and ties," "repairs and renewal of bridges and other structures"; "maintenance of equipment," "conducting transportation," including: "salaries and wages in the operating department," "supplies," "car mileage," "switching charges," "damage for injuries," "advertising," "outside agencies and commissions"; and "general expenses." They would not include "taxes," "rental of tracks and terminals," "interest on bonds," nor "balances available for dividends. These terms, so far as they apply to railroads, have been carefully defined, for the United States at large, by the Interstate Commerce Commission, and for California by our own State Board of Equalization, and in general are fully understood and applied by all more careful accountants. Precisely analogous items are carried in the accounts of almost all public-service corporations, and the accounts can always be segregated under similar divisions.

Rents or Rental Charges Not Included Among Operating Expenses.

Some corporation officers have argued before the Commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes* on PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included. All persons readily admit that interest on bonded indebtedness is not an operating expense; if that is the case, rent is not an operating expense. It would have made no difference, so far as this matter is concerned, whether the Southern Pacific build the Lucin cut-off, as it did, with the proceeds of bonds on which it pays a certain sum annually as interest, or had leased that great bridge from some other company, paying the same sum annually as rent. In neither case would the annual payment be an operating expense; in each case it is a return to property.

Annual Payments on Account of the Franchise.

In the same way, and even more fallaciously, corporation officers, especially street railroad officers, have argued that they should be allowed to deduct from the amount of taxes due the State any payments made to the cities on behalf of the franchises. This argument is even more shallow than the preceding one; it is, in fact, little short of absurd.

It rests upon the mere accidents that these payments are sometimes miscalled taxes and are usually measured by the gross earnings. As a matter of fact, these payments are rentals, for the use of a certain kind of public property, namely, the streets. It is quite as absurd for a street car company to call these "taxes" and ask that they be allowed to subtract such payments from their taxes due the State, as it would be to call the rents paid for office buildings taxes and ask to have them deducted.

A street car or other public-service corporation can acquire its franchises from cities in one of two ways: (1) it may buy them outright for a certain sum down, in which case it usually issues bonds for the amount and pays the bondholders interest thereon. No one would have the effrontery to argue that such interest was an operating expense. Or, (2) it may make a series of annual payments in proportion to business done or gross earnings. These payments are precisely the same in nature as the interest payments under the first method, and so closely are such things figured when franchises are bid for that the one is the precise equivalent of the other.

These payments are rents and should not even be included in operating expenses; to ask that they be considered taxes and deducted from the amount paid the State is to ask exemption for one of the most valuable items of property the companies use, namely, their franchises.

Reports Made to the Commission.

In the reports asked for by this Commission from the different public-service corporations, the effort has been made to ascertain:

First, the gross earnings from operation; under which would not be included any returns or revenues obtained from investments in property not directly used in the peculiar business in which the corporation was engaged. Thus, for example, revenues obtained from the sale of railroad lands or from investments of surplus or sinking funds held by other classes of corporations would not be included in the gross earnings.

Second, the operating expenses in the sense above defined, exclusive of all items belonging to the capital account, and of the nature of interest, rents, etc.

Earnings of Similar Companies Outside of California.

In order to ascertain whether the reports made to us by the California companies were normal or whether they represented exceptional and unusual conditions, also for the purpose of obtaining a check upon the accuracy of the returns made to us, the Commission has ascertained, so far as possible, from other sources what the proportion

of operating expenses to gross earnings was for each of these different classes of corporations in other parts of the country. In this way it is thought that the classes into which the different corporations fall, according to the percentage which their net earnings bear to the gross earnings, have been representatively determined, and the various types of corporations ascertained. The detailed figures for each of these will be given in connection with the special discussion of the taxation of each class of corporations.

Rate of Capitalization.

The rate of interest which should be allowed in equity to investors in each of the different classes of corporations is a matter which is often discussed in connection with fixing the rates or charges for their services to be allowed public service corporations by county and city boards and the like. The Commission has made no effort to solve the much vexed question of what the rate *ought* to be, but only what rate is accepted. It has simply undertaken to ascertain, as nearly as may be, in the case of each of the various classes of corporations, approximately what rate the market quotations seem to indicate as one satisfactory to the investors themselves. Thus, for example, it was ascertained that the investors in the securities of the Southern Pacific Company in 1904 were contented with 5.655% returns on their investment, which allowing 1% additional for taxes, would give us 6.655% as the basis of capitalization. The Santa Fé investors were content with 6.172%, and so on. The percentages to be used will vary somewhat with the risk of the business and are ordinarily higher for small companies. This offsets to some extent the fact that their net receipts are a smaller proportion of their gross income than in the case of larger companies, owing to the greater expense of operation.

The rates at which the net income of different classes of industries should be capitalized is fairly well known among business men, and the rates adopted by the Commission for the different classes of corporations are those which have generally prevailed.

The Rate on Property.

What constitutes a fair rate on the property with which to compare the effect of any given rate on gross earnings is an extremely intricate question. The prevailing rates of taxation as ascertained by the Commission throughout this State are: About $1.75 per $100 of assessed valuation for property outside of corporate limits, and about $2.55 per $100 of assessed valuation for property inside corporate limits. The average of all taxes both inside and out is about $1.825 per $100 of assessed valuation. The Commission has been inclined to think that the assessed valuation is about 60% of the true value. This percentage

varies in different parts of the State very largely, and varies considerably from year to year. It varies also from one piece of property to another. There is no practical method of ascertaining exactly what this average percentage is short of an attempt to revalue all the property of the State, which is equivalent to remaking the assessment rolls of each and every county. This is a task far beyond the means of the Commission and the time at its disposal. It is practically certain from the extensive investigation made by the Census Bureau and stated in another chapter of this Report, that farming lands are assessed on the average at about 65%, making taxes on this class of property on the average of 1.14% of the true value. The tax rate on city property, being considerably higher, would offset to a considerable extent any lower valuation that may prevail in the cities. Even if property is assessed as low as 50% of its true value the average burden of taxation throughout the State is still close to 1%.

The Commission has been literally bombarded with so-called "evidence" submitted by interested parties that property is assessed for less than 60% of its true value. This "evidence" usually takes the form of *ex parte* statements as to assessed and market values, and sometimes of actual tax bills and deeds showing the sale of the property covered thereby at prices far above the assessed value. The ultimate effect of this "evidence" on the minds of the members is that these are more or less cleverly selected special cases, usually isolated; exceptions which rather prove than disprove the rule. Assessor after assessor has declared that he never knowingly assesses any property at less than two-thirds of its "full cash value" as defined by law, which, it must be remembered, is not the same as "highest market value." To offset the above evidence of undervaluation it would be easy to collect just as many instances of overvaluation. It is the average that counts, and *the average is fixed by the multitude of common people who pay taxes on their little homes or farms*, not by the shrewd speculators who evade taxes on property whose values they boom.

The Commission has assumed throughout this Report that property now on the tax rolls bears a burden of about 1% of its true value. It should be stated in this connection that the Commission uses the term "true value" or "full cash value" in the sense in which it is defined in the Code, namely, that value at which the property would be taken in payment of a just debt due from a solvent creditor. This is not the equivalent of the highest market value which the property might command under special circumstances. It should further be stated that the Commission means in this respect to include only property now on the tax rolls, and that in the nature of things no allowance is made or can be made for additional property such as personal property belonging to the owner of this class of property but concealed from the assessor

so as to evade taxation. This Commission holds that this is the only proper basis for comparison as to the actual tax rates, and regards the criticisms sometimes advanced to the effect that this rate makes no allowance for property which ought to be assessed and is not assessed, as not well taken. The fact is, that the property which we succeed in reaching under our present tax system bears on the average a burden of taxation equal to about 1% on its full cash value.

What constitutes a "fair rate" of taxation must be determined primarily by the needs of the different branches of the government. The amount which it is necessary to raise apportioned among the subjects upon which the levy is to be made will ultimately give the exact rate. But when we depart from the method of apportionment heretofore in vogue and establish a fixed tariff upon certain classes of tax subjects, as is proposed by this Commission, for the subjects selected for State taxation, we have to assume in advance what will ultimately be the rate necessary to be levied upon other property. The Commission is of the opinion that in the long run the various classes of property in the State will be called upon to contribute at the rate of about 1% per annum to the support of the different branches of government, and that this amount is about what the services of the government are worth to the taxpayers, and sets approximately what the various branches of the government ought to levy.

In another sense, what constitutes a fair rate of taxation will ultimately be determined by the general consensus of opinion. The "fairness" of a tax rate depends primarily upon the value of the government's services to the taxpayer. This, like any other "value" not fixed by a price in the open market, is largely a matter of opinion. In the United States in general where most of the taxes are levied on property the rates run from about 1% to 1½% or in extreme cases to 2% upon the true value of the property. Business men, especially those who deal in real estate, very generally reckon that 1% is the burden of taxation, and pretty generally agree that such a rate is fair and equitable. If the tax rate exceeds this by very much, there is usually a complaint and the government is regarded as extravagant or criticised for waste of public money.

The adoption of 1% as the basis of all computations and not the actual averages ascertained, namely, 1.14% for rural property and 1.53% for city property, is justified on the ground that the plan of separation proposed will reduce the present burden of taxation on real estate by about the amount of the fraction rejected.

FILED
FEB 18
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 133

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California, F. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California; H. A. PAYNE, Auditor of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic, *Petitioners.*

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation), *Respondents.*

RESPONDENTS' ANSWER TO PETITION FOR A REHEARING OR MODIFICATION OF DECREE.

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SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR A REHEARING OR MODIFICATION OF DECREE.

In their petition for a rehearing or modification of decree petitioners advance two points. Neither of them

is new. Both were fully discussed in the briefs heretofore filed and no new argument or authority is advanced.

The first point, concerning the relation between rate fixing and taxes upon public service corporations, is discussed on pages 110 to 120 of petitioners' brief and is answered on page 63 of the respondents' brief. The argument on this subject, as framed in the petition for rehearing, is, in effect, that since taxes are taken into account by rate fixing bodies, public service corporations cannot complain of unequal or discriminatory taxation, because adjustment for any inequality or discrimination in that behalf is made in the fixing of rates. Manifestly, however, it is not the concern and function of rate making bodies to fix taxes in a just and equal manner. If petitioners' argument were sound it would mean that no public service corporation, the service rates of which are subject to regulation, could ever successfully resist the collection of any tax, no matter how unjust, discriminatory or devoid of lawful foundation.

Petitioners' second point, that the decision of this court is contrary to decisions of the State Supreme Court preceding the opinion in the mandamus case (*Pacific Telephone and Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96), which was set aside upon rehearing (Resp. Br. p. 21), has likewise been fully discussed in the briefs heretofore filed (*Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700 (Pet. Br. pp. 109, 170, 171, Resp. Br. pp. 51, 63-64; see also pp. 16, 17, 34, 35, 46); *Union Tank Line Co. v. Richardson*, 183 Cal. 469, 191 Pac. 697 (Pet. Br. p. 174, Resp. Br. p. 64); *Pacific Gas & Electric Co. v. Roberts*, 176 Cal. 183, 167 Pac. 845 (Pet. Br. pp. 172, 173, Resp. Br. p. 64)).

There is no significance, so far as the case at bar is concerned, in the proposed constitutional amendment which was defeated in 1922 (Pet. for Rehearing, p. 12). The purpose of that constitutional amendment was to change the rule declared by the State Supreme Court in *Pacific Gas & Electric Co. v. Roberts*, 176 Cal. 183, 167 Pac. 845 (Resp. Br. p. 64), so as to permit the deduction from gross receipts upon which state taxes are paid, of any amount paid by a public utility in purchasing the commodity in which it dealt, that is, to permit electric companies to deduct the amounts paid for electricity or gas companies to deduct the amounts paid for gas, etc. We have already pointed out (Resp. Br. p. 64) that the decision in the *Roberts* case does not uphold unequal or discriminatory taxation, but, on the contrary, was strictly in accord with the principles of the gross receipts tax and with the theory on which the rates of that tax were fixed (Resp. Br. p. 64). By rejecting the proposed constitutional amendment the people declined to make an illogical exception to this theory.

The matter of franchise values to which petitioners refer (Pet. for Rehearing p. 8) is discussed in the briefs on file (Resp. Br. pp. 36, 64; Pet. Br. pp. 151-152).

We respectfully submit that the petition for rehearing should be denied.

Dated, San Francisco,
February 8, 1928.

ALFRED SUTRO,
Attorney for Respondents.

OSCAR LAWLER,
EUGENE M. PRINCE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 133.—October Term, 1927.

Ed. W. Hopkins, Assessor of the County of Los Angeles, State of California; E. M. Ross, Deputy Assessor, etc.; W. O. Welch, Tax Collector, etc., et al., Petitioners, vs. Southern California Telephone Company and The Pacific Telephone and Telegraph Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 3, 1928.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners are Los Angeles County, and its tax officials—assessor, deputy assessor, collector, and auditor.

Respondents are incorporated under the laws of California and in that State operate telephone systems for the transmission of local and long distance messages. For the use of patrons in Los Angeles County, they supply and maintain more than 300,000 telephone instruments. The component parts of these instruments are the receiver, transmitter and induction coil, known as the "talking set"; metal (desk) stand or wooden cabinet (for attachment to wall) which support, connect or house the talking devices; and necessary wire connections.

Talking sets are essential to the operation of any telephone system. Those associated with instruments supplied by respondents are leased by them from the American Telephone & Telegraph Company, a New York corporation, which holds title thereto. The remaining parts of these instruments—stands, cabinets, etc.—and perhaps all other operating property in the systems—poles, wires, conduits, etc.—are owned by respondents.

As the statute directs, respondents made regular reports to the State Board of Equalization showing their operative property (including telephone instruments) and their gross receipts from every source. They paid to the State in lieu of taxes, or were ready to pay when due, the prescribed portions of these receipts. Without making formal objection to the inclusion in such reports of telephone instruments as operating property, the petitioning tax officers, purporting to act for the county and sixteen municipalities therein, for local purposes, assessed against the American Telephone & Telegraph Company, as owner, the value of all talking sets within that County (more than 300,000) and demanded payment of taxes thereon for 1925 at the rate borne by ordinary tangible personalty. This was not complied with and they threatened to disconnect the sets, and sell them, and thereby disrupt the systems.

Thereupon, July 17, 1925, respondents filed the original bill—afterwards amended—in the United States District Court, Southern District of California. They set forth the above stated facts, referred to the constitution and statutes of California and said no tax properly could be laid upon the leased speaking sets since all possible claim against them had been discharged through due payment to the State of the prescribed portion of gross receipts, partly derived therefrom. They alleged that these sets were not subject to local taxation; to disconnect them from respondents' systems would do irreparable harm; to enforce the demand for local taxes would violate rights guaranteed by the Fourteenth Amendment; there was no adequate remedy at law through payment and suit to recover, or otherwise. And they asked for an injunction restraining the threatened wrong.

It appeared that for the fiscal year 1924-1925 respondent telephone companies paid to the State, out of their gross receipts, $2,080,005.72; and for the year ending June 30, 1926, would pay $2,340,075.12.

The cause was submitted "upon defendants' motion to dismiss and, in the event that said motion should be denied, then, without further hearing, for final determination upon the application for a permanent injunction as prayed in their complaint."

The District Court dismissed the bill, February 3, 1926, for want of jurisdiction. The Circuit Court of Appeals concluded correctly, we think, that there was jurisdiction; the California

statutes afforded no certain adequate remedy through payment of the demanded taxes followed by suit at law to recover; the talking sets were not subject to local taxation, having been wholly relieved by payment of the gross receipts tax to the State. It accordingly reversed the decree of the trial court and directed an injunction as prayed.

Section 14, Article XIII, Constitution of California provides—

> Taxes levied, assessed and collected as hereinafter provided upon railroads, . . . ; telegraph companies; telephone companies; . . . shall be entirely and exclusively for State purposes, and shall be levied, assessed and collected in the manner hereinafter provided. . . .
>
> (a) . . . all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the State a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this State, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this State. . . .
>
> The percentages above mentioned shall be as follows: . . . on all telegraph and telephone companies, three and one-half per cent.; [by later Legislative action increased to 5½%] Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; . . . .

Pertinent provisions of the Political Code are in the margin.*

*California Political Code—

Sec. 3664a. 1. All railroad companies, . . . ; all telegraph and telephone companies; . . . shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof, used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state.

4. Such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except

Considering what this Court said in Raymond, *Treasurer*, v. *Chicago Traction Co.*, 207 U. S. 20, *Home Telephone Company* v. *County of Los Angeles*, 227 U. S. 278, and *Binderup* v. *Pathe Exchange*, 263 U. S. 291, we must conclude that the bill set forth claims of right under the Federal Constitution sufficiently substantial to give the trial court jurisdiction of the cause. As it acquired jurisdiction, all material questions were open for decision. *Greene, Auditor*, v. *Louisville, etc. Co.*, 244 U. S. 499.

Petitioners maintain that under Secs. 3804 and 3819, California Political Code, respondents could have protected their rights by paying the assessed tax and bringing actions to recover. But whether either of these sections applies in circumstances like those here presented is far from certain. Section 3819 gives a remedy to

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as otherwise provided in section fourteen of article thirteen of the constitution of this state.

Sec. 3665a. 1. The term "gross receipts from operation" as used in section three thousand six hundred sixty *four a* of this code is hereby defined to include all sums received from business done within this state, during the year ending the thirty-first day of December last preceding, including the company's proportion of gross receipts from any and all sources on account of business done by it within this state, in connection with other companies described in said section.

Sec. 3665b. The term "operative property" as used in any section of this code shall include:

(d) In the case of telegraph and telephone companies doing business in this state: The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings.

Sec. 3666. 1. If any assessor finds in the report of the operative property in his county, city and county, municipality, or district, furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as non-operative property, or partially operative and partially nonoperative, he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as non-operative property. [The Board must pass upon the contest.] . . . Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company unless set aside by a court of competent jurisdiction, and each such assessor must note the decision on his assessment roll, and must assess such property accordingly.

the *owner*; and *Warren* v. *San Francisco*, 150 Cal. 167, intimates quite strongly that it applies only to actual owners. Whether the lessee who has paid taxes upon the owners' property can recover under Section 3804 is also questionable. Counsel differ widely concerning the meaning of these sections and no opinion of the State court removes the doubt. In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments. The County and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible.

Unquestionably the talking sets would have been free from local assessments if the title had been in respondents; but petitioners stoutly maintain that the gross receipts tax prescribed by the Constitution is not in lieu of local taxes upon *leased* property.

No ruling of the California Supreme Court authoritatively determines whether personal property leased by a telephone company and actually used for operating purposes is relieved from local taxation by payment to the State of the prescribed percentage of the lessee's gross receipts. July 2, 1927,—after the decision below—that court handed down an opinion which declared leased improved real estate, although actually used as operating property, was subject to local taxation. *Pacific Telephone & Telegraph Co.* v. *State Board of Equalization*, 74 Cal. Dec. 96. But rehearing was granted and this vacated "the previous opinion and judgment and set the whole matter at large." *Miller & Lux Incorporated* v. *James*, 180 Cal. 38, 48.

The argument against exemption of leased property from local taxation rests chiefly upon literal and narrow interpretation of words in Sec. 14, Article XIII, California Constitution—" . . . all telegraph and telephone companies . . . shall annually pay to the State a tax upon *their* franchises, . . . , poles, wires, pipes, canals, conduits, rights of way, and other property . . . used exclusively in the operation of their business"; and "such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the *property* above enumerated *of such* companies."

But the Constitution plainly directs, "taxes levied, assessed and collected as hereinafter provided upon . . . telephone companies . . . shall be entirely and exclusively for State purposes" and such companies "shall annually pay to the State a tax upon their poles, . . . and other property, or any part thereof, used exclusively in the operation of their business." And the Political Code provides [Sec. 3664] that "taxes levied, assessed and collected as hereinafter provided upon telephone companies shall be entirely and exclusively for State purposes and shall be assessed and levied by the State Board of Equalization;" [Sec. 3664a] that "all . . . telegraph and telephone companies . . . shall annually pay to the State a tax upon their . . . poles, wires, . . . and any other property, or any part thereof, used exclusively in the operation of their business . . .;" [Sec. 3664a-4] "such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies except . . .;" [Sec. 3665a] "the term 'gross receipts from operation' as used in Sec. 3664a of this Code is hereby defined to include all sums received from business done within this State;" [Sec. 3666] if an assessor finds reported as operative property in his country any which he regards as nonoperative, he shall notify the Board of Equalization within thirty days; and [Sec. 3607] "nothing in this Code shall be construed to require or permit double taxation."

Sec. 14, Article XIII, (adopted 1910) was proposed by a Commission which gave the matter much consideration and made an elaborate Report. It is the result of an earnest effort to provide for enforcement of adequate contributions from public service and some other corporations while avoiding double and unjust taxation. Payment of specified percentages (subject to change by the Legislature) of gross receipts was directed upon the theory that the value of operative property could be fairly measured by considering receipts therefrom. Also, that by paying to the State a portion of these, the corporation would, in effect, contribute for its operative property the substantial equivalent of all taxes laid upon other property. The Commission (Rep. 1910, p. 19) said—"In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other

classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission."

The Supreme Court of the State has declared the gross receipts tax is essentially one on property, *Pullman Company* v. *Richardson*, 185 Cal. 484, 487; and it apparently approves the view that "a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied." *Pacific Gas & Electric Co.* v. *Roberts*, 168 Cal. 420, 425. See *Southern Pacific Co.* v. *Levee District No. 1*, 172 Cal. 345; *Great Western Power Co.* v. *City of Oakland*, 189 Cal. 649.

The State received from respondents a sum equal to five and one-half per centum of the gross revenues derived from all operative property under their control-leased as well as owned. These did not depend upon ownership; and rent paid out was not considered.

If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while a competitor with equal receipts, by paying the same amount, might absolve from local assessment property of very large value.

These difficulties can not be avoided by saying the lessee will not pay assessments against the lessor and therefore can not complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.

Here respondents have surrendered out of gross receipts the equivalent of the burden imposed upon other property not less valuable than all the operating property in their systems; and now,

unless more is paid, disruption is threatened through seizure and sale of essential instrumentalities actually employed to produce those receipts.

We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise. Without an authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation.

Affirmed.

Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.